No. 17-965

IN THE
Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

STATE OF HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court has the power to review respondents' challenge to Proclamation No. 9645.

2. Whether Proclamation No. 9645 exceeds the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a).

3. Whether Proclamation No. 9645 "discriminate[s] * * * because of * * * nationality" in violation of 8 U.S.C. § 1152(a)(1)(A).

4. Whether Proclamation No. 9645 violates the Establishment Clause.

5. Whether the scope of the injunction against Proclamation No. 9645 is proper.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Muslim Association of Hawaii, Inc. has no parent corporations. It has no stock, and hence, no publicly held company holds any of its stock.

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BRIEF FOR RESPONDENTS

INTRODUCTION

The President's order is without parallel in our Nation's history. For over a year, the President campaigned on the pledge, never retracted, that he would ban Muslims from entering the United States. And upon taking office, the President issued and reissued, and reissued again, a sweeping and unilateral order that purports to bar over 150 million aliens—the vast majority of them Muslim—from entering the United States.

The immigration laws and the Constitution do not grant the Executive that unbridled power. Congress conferred upon the President the authority to suspend the entry of aliens whose admission he finds "detrimental to the interests of the United States." 8

U.S.C. § 1182(f). That provision permits the President to supplement and vindicate the "interests" reflected in the immigration laws; it does not empower the President to subvert the statutes Congress designed. Yet the President's proclamation openly flouts those laws: It excludes aliens on precisely the same grounds—nationality and the cooperation provided by an alien's government—that Congress found *insufficient* to warrant exclusion. Indeed, Congress expressly foreclosed the nationality-based discrimination that is at the proclamation's core. *Id.* § 1152(a)(1)(A).

The President's order also violates the most fundamental protections enshrined in our Constitution. The Establishment Clause forbids the Government from enacting policies that denigrate or exclude members of a particular faith. Yet any reasonable observer who heard the President's campaign promises, read his thinly justified orders banning overwhelmingly Muslim populations, and observed his Administration's persistent statements linking the two, would view the order and each of its precursors as the fulfillment of the President's promise to prohibit Muslim immigration to the United States.

The Government's defense of these violations rests on a breathtakingly vast conception of Executive power. The Government asserts that, through two opaque and little-used provisions of immigration law, Congress delegated to the President virtually the whole of its constitutional power over immigration. And the Government claims that the Court is powerless to review the President's compliance with the immigration laws, or to look beyond the face of his proclamation to discern its manifestly unconstitu-

tional purpose. No precedent of this Court condones the Executive's reconfiguration of our tripartite system to collect all powers in the hands of a single branch.

In short, "this wolf comes as a wolf." *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). The President has unlawfully barred millions of individuals from traveling to this country, trampled on the sovereign prerogatives of Hawaii and its sister states, and denigrated persons of the Muslim faith. The injunction should be affirmed.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in an addendum to this brief. Add. pp. 1a-82a.

STATEMENT

A. Constitutional and Statutory Background

1. Our Nation was founded by immigrants seeking religious freedoms in a new land. From bitter experience, the Founders had learned the potency of the immigration power, and how it could be abused. In the Declaration of Independence, the colonists listed among their chief grievances King George III's efforts "to prevent the population of these States" by "obstructing the Laws for Naturalization of Foreigners." Declaration of Independence ¶ 9 (1776). Meanwhile, colonial governments sought to entrench their establishments of religion by making colonists swear an oath of religious supremacy as a "precondition to immigration." Michael W. McConnell, *Establishment and Disestablishment of Religion at the*

Founding, Part I, 44 Wm. & Mary L. Rev. 2105, 2116 (2003).

The Framers drafted a Constitution designed to prevent their new government from adopting similar policies. They wrote an Establishment Clause that bars any practice "respecting an establishment of religion." U.S. Const. amend. I. They also vested in Congress, a diverse and deliberative body, all of the sources of the immigration power: the authority to "establish an uniform Rule of Naturalization," *id.* art. I, § 8, cl. 4, and the authority to "regulate Commerce with foreign Nations," *id.* cl. 3. When the Framers sought to forestall the debate on slavery, they did so by barring "*Congress*" from prohibiting "[m]igration" for a set period—reflecting their assumption that it is the Legislative Branch alone that possesses power to bar entry. *Id.* art. I, § 9, cl. 1 (emphasis added); *see Arizona* v. *United States*, 567 U.S. 387, 422-423 (2012) (Scalia, J., concurring in part and dissenting in part).

Thus, for centuries this Court has recognized that the immigration power resides exclusively in Congress. As early as 1884, the Court stated that "all the cases in this [C]ourt" hold that the power to restrict immigration "belongs exclusively to [C]ongress." *Head Money Cases*, 112 U.S. 580, 591 (1884); *see also Gibbons* v. *Ogden*, 9 Wheat. 1, 216-217 (1824) (recognizing that the power over "migration" was part of Congress's power over foreign commerce). The Court has repeated similar statements many times since. *See, e.g.*, *Arizona*, 567 U.S. at 409 ("[p]olicies pertaining to the entry of aliens" are "entrusted exclusively to Congress") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Fiallo* v.

Bell, 430 U.S. 787, 792-793 (1977) ("the particular classes of aliens that shall be denied entry" are "solely for the responsibility of the Congress").

2. Congress has implemented its immigration power principally through the Immigration and Nationality Act ("INA"), an "extensive and complex" framework that governs the admission of aliens. *Arizona*, 567 U.S. at 395. Among other things, the INA specifies in detail the "[c]lasses of aliens" who may not be admitted to the United States—including terrorists, criminals, and the indigent. 8 U.S.C. § 1182(a)(2), (3)(B), (4). And it vests in the President a measure of authority to "suspend the entry" of additional "class[es] of aliens" whose entry "would be detrimental to the interests of the United States." *Id.* § 1182(f).

The INA also requires every alien seeking entry to the United States to undergo a rigorous, individualized vetting process to ascertain her eligibility for a visa. As part of that process, each visa applicant must produce "certified cop[ies]" of documents establishing her identity, background, and criminal history. *Id.* § 1202(a)-(d). In addition, each applicant must undergo an in-person interview with a consular officer. *Id.* § 1202(h). Throughout, the applicant bears the burden of proving her admissibility; if it "appears" to a consular officer that an alien is inadmissible, then the officer must deny her entry. *Id.* §§ 1201(g)(1), 1361.

Congress has also established a Visa Waiver Program that permits aliens to skip this process if their governments cooperate with the United States in various ways—including by providing electronic

passports and sharing information on nationals who pose a national security threat. *Id.* § 1187(a), (c). Nationals of countries that do not qualify for the Visa Waiver Program may still come to the United States. They must simply obtain a visa first. *Id.* § 1187(a).

Since 1965, Congress has placed an important limit on the Executive's authority over immigration. That year, Congress abolished the system of nationality quotas that had previously governed immigration to this country—known as the "national origins system"—and replaced it with an immigration system based on family ties and merit. H.R. Rep. No. 89-745, at 8 (1965); *see* 8 U.S.C. §§ 1152(b), 1153. In order to prevent the Executive from restoring similar nationality discrimination in the future, Congress also enacted 8 U.S.C. § 1152(a)(1)(A), which prohibits any "discriminat[ion] * * * in the issuance of an immigrant visa because of * * * nationality."

B. Factual Background

1. Throughout his campaign for President, Donald Trump promised that, if elected, he would bar Muslims from entering the United States. On December 7, 2015, he issued a formal statement calling for "a total and complete shutdown of Muslims entering the United States." J.A. 119. Candidate Trump justified his proposal by observing that President Roosevelt "did the same thing" with respect to the internment of the Japanese during World War II. J.A. 120. A few months later, he explained: "I think Islam hates us. * * * [W]e can't allow people coming into this country who have this hatred of the United States * * * [a]nd of people that are not Muslim." J.A. 120-121. On another occasion he asserted that

"[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." J.A. 121.

Over the course of the campaign, Mr. Trump began to describe his proposal as a restriction on immigration from countries "where there's a proven history of terrorism." *Id.* When asked in July 2016 whether his new country-focused approach represented a "rollback" of the Muslim ban, he stated that "you could say it's an expansion." J.A. 122-123. Mr. Trump explained that he used different terminology because "[p]eople were so upset when I used the word Muslim. Oh, you can't use the word Muslim. * * * I'm talking territory instead of Muslim." J.A. 123. In October 2016, Mr. Trump reiterated that his proposed "Muslim ban" had "morphed into a[n] extreme vetting from certain areas of the world." *Id.* When asked on December 21, 2016, now as President-elect, whether he would "rethink" his "plans to * * * ban Muslim immigration," he responded: "You know my plans. All along, I've been proven to be right." *Id.*

2. On January 27, 2017, seven days after taking office, President Trump signed Executive Order No. 13,769 ("EO-1"), entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017). As he signed it, President Trump read the title, looked up, and said: "We all know what that means." J.A. 124.

EO-1 imposed an immediate, 90-day ban on entry by nationals of seven overwhelmingly Muslim countries. *Id.* It also suspended the U.S. Refugee Admissions Program for 120 days, subject to a carve-out for

refugees who were "religious minorit[ies]" in their home countries. *Id.* In an interview on the day EO-1 was signed, President Trump explained that this exception was designed to "help" Christians, asserting that in the past "[i]f you were a Muslim [refugee] you could come in, but if you were a Christian, it was almost impossible." J.A. 125.

One of President Trump's advisors, Rudolph Giuliani, explained the connection between EO-1 and the promised "Muslim ban." In a television interview the day after EO-1 was signed, Mr. Giuliani explained: "When [Donald Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" *Id.*

Within a week, a federal district court enjoined the enforcement of EO-1 nationwide. *Washington* v. *Trump*, 2017 WL 462040, at *2-3 (W.D. Wash. Feb. 3, 2017). The Ninth Circuit denied the Government's request for a stay. *Washington* v. *Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

3. Rather than continue to defend EO-1, the President decided to issue a "revised" Executive Order. J.A. 127. But the revisions were to be minor. Presidential Advisor Stephen Miller publicly explained that the new order would "have the same basic policy outcome" as the first, and that any changes would address "very technical issues that were brought up by the court." *Id.* During a February press conference, President Trump himself explained his intentions with respect to the revised Order, stating: "I keep my campaign promises, and our citizens will be very happy when they see the result." J.A. 127-128.

On March 6, 2017, the White House issued an order bearing the same title and imposing nearly identical entry bans as EO-1. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). EO-2 barred entry by nationals of six overwhelmingly Muslim countries for 90 days and excluded all refugees for 120 days. Pet. App. 158a, 165a-166a. It also established a process to identify "additional countries" for "inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals." *Id.* at 159a.

In a briefing the day after the new order was issued, White House Press Secretary Sean Spicer told reporters that with EO-2, President Trump "continue[d] to deliver on * * * his most significant campaign promises." J.A. 130. At the time, President Trump's regularly updated campaign website continued to feature his call for a "total and complete shutdown of Muslims entering the United States." That statement was not removed until minutes before the Fourth Circuit held oral argument concerning EO-2. J.A. 130-131.

Like its predecessor, EO-2 was enjoined. *Hawaii* v. *Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017); *Int'l Refugee Assistance Project ("IRAP")* v. *Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017). Hours after the first injunction issued, the President complained to a rally of his supporters that EO-2 was just a "watered down version of the first one" and had been "tailor[ed]" at the behest of "the lawyers." J.A. 131. In June 2017, while the Government was seeking review of EO-2 in this Court, the President issued a series of tweets endorsing the "original Travel Ban" and objecting that the Justice Department had

submitted a "watered down, politically correct version * * * to S.C." The President stated: "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!" J.A. 132-133. He then added: "That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!" J.A. 133.

On June 26, 2017, this Court partially stayed the injunctions against EO-2 and granted certiorari. *Trump* v. *IRAP*, 137 S. Ct. 2080 (2017) (per curiam). Before the Court heard argument, however, EO-2 expired, and this Court dismissed the case as moot. *Trump* v. *Hawaii*, 138 S. Ct. 377 (2017).

4. On September 27, 2017, the President issued the third iteration of his travel ban, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats," Proc. 9645 (Sept. 27, 2017) ("EO-3"). Despite the changed nomenclature, EO-3 is a direct descendant of EO-1 and EO-2. The first line of the order identifies it as an outgrowth of the process established in EO-2. Pet. App. 121a. And the order continues, and makes indefinite, substantially the same travel ban that has been at the core of all three executive orders.

EO-3 continues to ban all immigration from five of the six overwhelmingly Muslim countries covered by EO-2: Iran, Libya, Syria, Yemen, and Somalia, which range from 92.8% to 99.8% Muslim. Pet. App. 132a-137a; J.A. 135. It substitutes the sixth Muslim-majority country, Sudan, for another Muslim-

majority country, Chad, which is 55.3% Muslim. Pet. App. 131a-132a; J.A. 135. The order also prohibits all non-immigrant visas for nationals of Syria, all non-immigrant visas except student and exchange visas for nationals of Iran, and all business and tourist visas for nationals of Libya, Yemen, and Chad. Pet. App. 131a-137a.

EO-3 also imposes token restrictions on two non-Muslim-majority countries. The order bars some forms of entry for a small set of Venezuelan government officials. Pet. App. 134a. And it bans all entry from North Korea—a country that sent fewer than 100 nationals to the United States last year, and that was already subject to extensive entry bans. J.A. 135-136.

EO-3 states that the President selected countries for inclusion by examining whether they satisfied three "baseline" criteria: (1) whether a country ensures the "integrity" of travel documents by issuing "electronic passports" and "report[ing] lost and stolen passports"; (2) whether the country "provide[s] information about whether" its nationals "pose national security or public-safety risks"; and (3) whether the country complies with "final orders of removal" and is "a terrorist safe haven." Pet. App. 124a-125a, 129a (§ 1(c), (h)). These criteria are virtually identical to the criteria for inclusion in the Visa Waiver Program. *See* 8 U.S.C. § 1187(c). Yet while the INA provides that a country that fails to satisfy these criteria simply may not participate in the Visa Waiver Program, *id.* § 1187(a), EO-3 deems the nationals from such countries "detrimental to the interests of the United States" and indefinitely "suspends" their entry. *See* Pet. App. 129a-130a

(§ 1(h)(ii)-(iii)). That "suspension" is slated to last indefinitely. Pet. App. 142a-143a (§ 4).

President Trump has repeatedly linked EO-3 to his earlier orders and his campaign promises. Shortly before EO-3 was issued, the President announced that he was issuing a "larger, tougher and more specific" ban, and that he remained committed to a "travel ban" even if it is not "politically correct." J.A. 133. Several weeks later, the President retweeted three videos entitled "Muslim Destroys a Statue of Virgin Mary!" "Islamist mob pushes teenage boy off roof and beats him to death!" and "Muslim migrant beats up Dutch boy on crutches!" *IRAP* v. *Trump ("IRAP II")*, 883 F.3d 233, 267 (4th Cir. 2018) (en banc). When asked about these videos, the White House Deputy Press Secretary responded by saying: The "President has been talking about these security issues for years now, from the campaign trail to the White House" and "the President has addressed these issues with the travel order that he issued earlier this year and the companion proclamation." *Id.*

C. Procedural History

1. The State of Hawaii, the Muslim Association of Hawaii (the "Association"), Dr. Elshikh, and two John Doe plaintiffs challenged EO-3 in the District of Hawaii. In October, the District Court issued a preliminary injunction barring enforcement of the proclamation against individuals from all targeted nations except North Korea and Venezuela,[1] finding

[1] Respondents did not challenge EO-3's ban on North Korean nationals principally because "North Korean person[s]" are

that the order exceeded the President's authority under Section 1182(f) and violated Section 1152(a)(1). Pet. App. 76a-78a; J.A. 432.

2. In a unanimous, per curiam opinion, the Ninth Circuit affirmed. Pet. App. 4a. It explained that EO-3 is "inconsistent not just with the text of § 1182(f), but with the statutory framework as a whole, legislative history, and prior executive practice." Pet. App. 25a. Section 1182(f)'s text, it explained, authorizes only a "temporary" suspension of entry, yet the proclamation announces "a virtually perpetual restriction." Pet. App. 26a-27a. Furthermore, EO-3 "conflicts with the INA's finely reticulated regulatory scheme" by excluding aliens on grounds that "conflict[] with" the numerous specific judgments embodied in the INA—including by excluding aliens based on the "same criteria" Congress applied to determine participation in the Visa Waiver Program. Pet. App. 28a, 31a. The court also observed that the drafters designed Section 1182(f) to address "situation[s] Congress would be ill-equipped to address"—which EO-3 does not—and that the proclamation is "unprecedented in its scope, purpose, and breadth." Pet. App. 35a, 38a (internal quotation marks omitted). The Court added that reading Section 1182(f) to permit the President's sweeping exercise of authority

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already excluded pursuant to a separate sanctions order that is not part of this challenge. Exec. Order No. 13,810, § 1(a)(iv) (Sept. 25, 2017). The President's decision to apply the ban to a small number of Venezuelan officials responsible for the country's policies distinguishes Venezuela from the other nations affected by the ban. *See infra* p. 44 n.15.

would "raise serious constitutional problems." Pet. App. 39a (internal quotation marks omitted).

The Ninth Circuit also held that EO-3 "directly contravenes" 8 U.S.C. § 1152(a)(1)(A), by "precluding consular officers from issuing visas to nationals from the designated countries." Pet. App. 50a. Under ordinary principles of statutory construction, it explained, the President cannot use Section 1182(f) to override Section 1152(a)(1)(A)'s prohibition on nationality-based discrimination. Pet. App. 50a-53a.

Because the court found EO-3 invalid under the INA, it did not consider whether it also violated the Establishment Clause. Pet. App. 64a-65a.

3. The International Refugee Assistance Project brought a parallel challenge in the District of Maryland. The district court concluded that EO-3 violated Section 1152(a)(1)(A) and the Establishment Clause. *IRAP* v. *Trump*, 265 F. Supp. 3d 570 (D. Md. 2017). The Fourth Circuit, sitting en banc, affirmed, concluding that EO-3 "is unconstitutionally tainted with animus toward Islam." *IRAP II*, 883 F.3d at 257. Five judges separately concurred to explain that the order exceeded the President's authority under Section 1182(f) and violated Section 1152(a)(1)(A), as well. *See id.* at 290-308 (Gregory, C.J., concurring); *id.* at 311-320 (Keenan, J., joined by Diaz and Thacker, JJ., concurring); *id.* at 321-349 (Wynn, J., concurring).

SUMMARY OF ARGUMENT

The President seeks to impose a sweeping change to the immigration system, imposing a ban on the entry of 150 million aliens—the vast majority of them Muslim. Our Nation's Constitution and laws

foreclose this unprecedented assertion of power. And the Government's conception of an Executive with virtually limitless authority over immigration, and of a Judiciary powerless to check even the gravest statutory and constitutional violations, is irreconcilable with our Constitution's tripartite allocation of authority.

I. This Court has the power and duty to review respondents' claims. The Government contends that a principle of "nonreviewability" bars any challenge to the President's statutory violations, no matter how brazen. But precedent and the INA bar courts only from second-guessing *Congress*'s policy choices or individualized exercises of Executive *discretion*; they do not prevent the Judiciary from enforcing congressionally imposed limits on the Executive's authority. And nothing in the Administrative Procedure Act forecloses respondents' claim that the Executive has violated the statutory restrictions on its authority.

Respondents also have standing to challenge EO-3 under the Establishment Clause. EO-3 deprives every citizen of her right to a government free from the establishment of a disfavored faith. The order also imposes numerous concrete and particularized harms on respondents. To confer Establishment Clause standing, these harms need not implicate respondents' religion. In any event, EO-3 does inflict religious harm: It denigrates respondents' faith.

II. EO-3 violates the restrictions on the President's authority to suspend entry. Naturally read, Sections 1182(f) and 1185(a) permit the President to temporarily halt the admission of a "class of aliens" who share some characteristic that would render their

entry detrimental to the "interests" reflected in the immigration laws. That reading accords with the construction this Court has long given similar grants of authority in the immigration laws. It ensures that the President may not invoke his suspension power to subvert virtually the entirety of the INA's statutory scheme. And it conforms with every prior suspension order issued over the last century.

EO-3 grossly exceeds those limits. It does not exclude a "class" of aliens who share some characteristic that would render their entry harmful. Rather, it bans the immigration of a sprawling group of 150 million aliens who share nothing in common but nationality, and whom the Government can (and in many instances still does) safely admit. EO-3 also inverts the policies of the immigration laws. It excludes aliens based on nationality, a deeply disfavored characteristic under the INA. And it purports to target countries for exclusion because they fail to adequately cooperate with the United States—notwithstanding that Congress weighed *precisely* the same consideration in enacting the Visa Waiver Program and the INA's vetting system, and judged that it does not warrant excluding a country's nationals from the United States. Furthermore, because it is a perpetual ban, EO-3 violates the statutory requirement that the President "suspend" entry only for a "period" of time.

EO-3 also raises grave constitutional concerns. If the INA gave the President the sweeping power he claims, it would effect a constitutionally suspect delegation of authority, tantamount to granting the President a line-item veto over the entire immigration code. This Court's precedents bar Congress from

vesting such extravagant and unilateral authority in the President.

III. EO-3 also violates the nondiscrimination mandate set forth in 8 U.S.C. § 1152(a)(1)(A). That statute bars "discriminat[ion] * * * in the issuance of an immigrant visa because of * * * nationality." EO-3 flouts that unambiguous command by ordering immigration officers to deny aliens entry based on their nationality. The Government has no plausible answer to this clear text, and its reading would enable the President single-handedly to revive the national quota system that Congress enacted Section 1152(a)(1)(A) to banish. The Government's argument that the President may invoke Sections 1182(f) and 1185(a) to supersede the limits imposed by Section 1152(a)(1)(A) is contradicted by every applicable canon of construction.

IV. Because of EO-3's statutory defects, this Court need not reach the constitutional question. *See Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193, 204-205 (2009). But if it does, the answer is clear: EO-3, like its predecessors, transgresses the Establishment Clause's bedrock command that the Government may not take actions for the purpose of excluding members of a particular faith.

The Government argues that the Court may not consider this claim because EO-3 offers a "facially legitimate" and "bona fide" rationale. Such sweeping deference is inappropriate when the President is exercising broad policymaking power, and it is particularly inappropriate in the context of an Establishment Clause challenge. In any event, the Gov-

ernment has not offered a "facially legitimate *and bona fide*" justification.

Rather, the evidence is overwhelming that EO-3 was issued for the unconstitutional purpose of excluding Muslims from the United States. A litany of statements by the President and his Administration, stretching from the presidential campaign to the weeks after EO-3 was released, plainly announce the President's aim of blocking Muslim entry. In text and operation, EO-3 carries out that policy, by banning overwhelmingly Muslim populations. No principle justifies shutting the Court's eyes to this wealth of evidence. The Court need not engage in judicial psychoanalysis of the President's motives; it may simply examine the objective indicia of intent that any neutral observer would consider.

V. A nationwide injunction is appropriate. Where a policy is facially invalid, courts have the authority to enjoin it in full. A nationwide injunction in this case would prevent the splintering of immigration enforcement and ensure that respondents are accorded complete relief.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE JUSTICIABLE.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). The Government spends the first third of its brief asking this Court to shirk that duty and to hold this case unreviewable. But this Court's "precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of

the judicial role." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010). Indeed, if courts were as powerless as petitioners assert, it would give one man the authority to switch statutes and the Constitution "on or off at will." *Boumediene* v. *Bush*, 553 U.S. 723, 765 (2008). That is not the system our Framers created.

A. Respondents Have Standing.

The Government wisely chooses not to contest respondents' Article III standing. Like its predecessors, EO-3 indisputably inflicts "concrete hardship" on respondents. *IRAP*, 137 S. Ct. at 2089.

The State, "as the operator of the University of Hawai'i system, suffer[s] proprietary injuries" because of EO-3's impact on current and prospective scholars. Pet. App. 79a-81a. The individual respondents are impeded from reuniting with close family who have applied for visas. *Id.* at 82a-85a. The Association is hindered in its ability to welcome visitors to its community, an important part of the mosque's "religious practice." J.A. 147. And both the individual and Association respondents suffer the denigration of their Muslim faith. J.A. 144-147. Each harm is actual and imminent, directly traceable to EO-3, and redressable by the order's invalidation.

While the Government previously argued that "respondents' challenges are not ripe," Pet. 20, it has now abandoned that contention. For good reason: EO-3 subjects respondents' relatives and associates to an immediate ban, and currently hampers the University's recruitment and retention efforts. The prospect that a government official might decide, in

his unreviewable discretion, to waive that ban in an individual case does not eliminate the harm. *See Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003) ("denial of equal treatment resulting from the imposition of [a] barrier" is a cognizable injury). That is particularly so because the prospect of a waiver appears largely illusory: According to the State Department, as of February 15, only *two* waivers had been granted to the many thousands of applicants since EO-3 went into effect.[2] And the mother of one of the John Does has in fact had her visa denied, demonstrating that respondents' asserted harms are far from speculative.[3]

B. Respondents' Statutory Claims Are Reviewable.

1. Both the Administrative Procedure Act and longstanding equitable principles permit individuals aggrieved by a legal violation to bring suit to enjoin "violations of federal law by federal officials." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see* 5 U.S.C. §§ 702(2), 706(2). It is

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[2] Yeganeh Torbati & Mica Rosenberg, *Exclusive: Visa waivers rarely granted under Trump's latest U.S. travel ban: data*, Reuters (Mar. 6, 2018), https://goo.gl/4w3F3W.

[3] Respondents noted this in their brief in opposition, and indicated they would "take the appropriate steps" to supplement the record. Opp. 9 n.4. Factual developments bearing on justiciability can be "disclosed to the Court in a * * * brief," and an "affidavit is not required." Stephen M. Shapiro et al., *Supreme Court Practice*, § 19.4, p. 967 (10th ed. 2013). The Government does not appear to contest the visa denial, or the propriety of bringing that fact to the Court's attention in this manner. Br. 25 n.9.

well-settled that in adjudicating such claims, the Judiciary may, if necessary, determine whether "the President [has] act[ed] in contravention of the will of Congress." *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981) (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring)). Thus, in *Dames & Moore*, the Court reviewed whether a presidential order nullifying attachments and suspending claims against Iran complied with the limits on the President's statutory authority. 453 U.S. at 669-688. Similarly, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court evaluated whether the President violated various provisions of the INA by invoking his authority under 8 U.S.C. § 1182(f) to "suspend[] the entry of undocumented aliens from the high seas." 509 U.S. at 160.[4]

Respondents' claim is no different. Just as in *Sale*, respondents contend that the President has exceeded the limits of his authority under Sections 1182(f) and 1185(a), and violated the express restriction set forth in 8 U.S.C. § 1152(a)(1)(A). Resolving these statutory claims is "a familiar judicial exercise," one this Court has never doubted it may undertake. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012); *see INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983) ("Executive action under legislatively delegated authority * * * is always subject to check by the

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[4] In *Sale*, the Government argued extensively that the plaintiffs' claims were unreviewable. U.S. Br. 13-18 (No. 92-344); Oral Arg. Tr., 1993 WL 754941, at *16-22. No Justice accepted that argument.

terms of the legislation * * * and if that authority is exceeded it is open to judicial review.").

2. The Government nonetheless claims that this Court is powerless to review the President's compliance with the laws governing the exclusion of aliens. If the breadth of that claim were not already clear, the Government conceded at oral argument in the Ninth Circuit that, in its view, the President could unilaterally suspend *all* immigration to the United States, and escape any judicial review whatsoever. C.A. Oral Argument at 13:57-15:11.

No case supports that staggering proposition. The Government's principal authorities say only that courts generally cannot review whether *Congress* acted "unreasonably" in imposing an entry restriction. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588 (1952); *see Fiallo*, 430 U.S. at 792-793. That principle flows from the fact that Congress has plenary power over immigration, and that courts are ill-equipped to second-guess Congress's "policy choices." *Fiallo*, 430 U.S. at 793, 798-799. Reviewing whether the President acts within the scope of his statutory authority implicates neither concern; it vindicates, not undermines, Congress's immigration power.

The Government also relies on cases in which courts have declined to review individual exclusion decisions. Yet those cases simply hold that courts will not scrutinize how an immigration officer "exercis[ed] the *discretion* entrusted to him by Congress" when "exclud[ing] a given alien." *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543-544 (1950) (emphasis added); *see Nishimura Ekiu* v. *United States*,

142 U.S. 651, 660 (1892); *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1158 & n.2 (D.C. Cir. 1999). They do not suggest that courts are barred from considering whether the Executive has been delegated that discretion in the first place. *See Lloyd Sabaudo Societa Anonima Per Azioni* v. *Elting*, 287 U.S. 329, 334, 335 (1932) (reviewing whether an exclusion decision was "within [an officer's] statutory authority," but not whether the official abused "the discretion which, under the statute, he alone may exercise"). Indeed, *Knauff* itself considered whether the exclusion at issue violated two federal statutes. 142 U.S. at 544-547.

The Government also asserts (at 19) that the INA prohibits judicial review. But the Government does not come close to carrying the "heavy burden" of "show[ing] that Congress prohibit[ed] all judicial review of the [Executive]'s compliance with a legislative mandate." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted). The principal provision it identifies, 8 U.S.C. § 1252, sets forth the process for challenging "final order[s] of removal." 8 U.S.C. § 1252(a)(1), (5). As the Court recently explained, this statute does not even "present a jurisdictional bar" to claims challenging the detention of an alien *in removal proceedings*. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 841 (2018). Still less does it render a challenge "effectively unreviewable" when it is asserted against a policy of exclusion and separately from removal proceedings. *Id.* at 840.

Section 236(f) is even less relevant. It provides that "[n]othing in this section"—which defines the functions of consular officers—"shall be construed to

create or authorize a private right of action." 6 U.S.C. § 236(f). Respondents do not invoke such a right; they rely on the APA and equitable causes of action that predate Section 236 by decades.[5]

3. The Government offers two additional reasons (at 23-25) why it believes APA review is unavailable. Neither withstands scrutiny.

First, the Government asserts (at 23-24) that the challenged actions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The essence of respondents' argument, however, is that Congress did *not* vest the President with complete discretion to exclude aliens whenever he wishes, but rather placed limits on that power that the President has violated. *See* Part II, *infra*. Courts regularly distinguish between challenges to the Executive's exercise of discretion and claims that "the President has violated a statutory mandate" in this manner. *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994); *see, e.g.*, *Jennings*, 138 S. Ct. at 841 (permitting challenge to "the extent of the Government's * * * authority under the 'statutory framework' as a whole," but not a challenge to a "'discretionary judgment' by the Attorney General").

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[5] The Government also maintains that Congress's abrogation of *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), supports its position. Not so. While Congress provided that certain discretionary "orders of deportation" against aliens present in the United States should be channeled through habeas corpus, Pub. L. 87-301, § 5(a) (1961), it did *not* displace judicial review of whether the President has acted within the scope of his statutory authority. Instead, Congress merely "restored" the law "to the position it occupied until December 1956." H.R. Rep. No. 87-565, at 16 (1961).

Second, the Government argues (at 24-25) that respondents are not "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. But the INA establishes visas specifically designed to promote family unification, 8 U.S.C. § 1153(a), and to facilitate the admission of students and scholars, *id.* § 1101(a)(15)(F), (H), (J), (O). Respondents need only fall "arguably within the zone of interests * * * protected" by these provisions. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012). Respondents easily meet that standard; EO-3 prevents respondents' relatives and prospective University of Hawaii scholars from obtaining family-preference and scholar visas. *See Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State ("LAVAS")*, 45 F.3d 469, 471 (D.C. Cir. 1995) (Sentelle, J.) (authorizing family members to challenge violation of Section 1152(a)(1)(A)).[6]

The Government contends (at 24-25) that respondents must show that 8 U.S.C. §§ 1182(f) and 1185(a) themselves confer "rights on private parties." This Court has held otherwise: The zone-of-interests analysis does not consider single provisions in isolation, but examines "the purposes implicit in the statute" as a whole. *Match-E-Be-Nash-She-Wish*,

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[6] There is no doubt that the agency defendants have taken "final agency action": They have "put the Proclamation into full effect" and issued detailed guidance describing their enforcement policy. Br. 11; *see U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (a policy is "final" if it "give[s] notice" of the agency's enforcement plans, even if no "particular action [has been] brought against a particular [entity]").

567 U.S. at 225; *see Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (broadly examining "the interests protected by the Lanham Act"); *see also Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987).

4. In any event, respondents also have a cause of action in equity to enjoin "violations of federal law by federal officials," including the President. *Armstrong*, 135 S. Ct. at 1384; *see Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996) (Silberman, J.). The Government argues that respondents cannot avail themselves of an equitable action if they do not meet the APA's requirements. But "[n]othing in the subsequent enactment of the APA altered" the courts' basic equitable authority to enjoin Executive actions that exceed statutory limits. *Chamber of Commerce*, 74 F.3d at 1328.

C. Respondents' Constitutional Claims Are Reviewable.

The Government acknowledges that this Court may review respondents' constitutional challenge as long as they have asserted a violation of their own Establishment Clause rights. Br. 26; *see Kleindienst* v. *Mandel*, 408 U.S. 753, 762-765 (1972). Respondents' Establishment Clause challenge plainly meets that description.

1. Unlike the other clauses of the First Amendment, the Establishment Clause does not merely preclude the Government from interfering with the rights of a particular individual. Instead, it "deem[s] religious establishment antithetical to the freedom of all," and thus withdraws from the Government the power to effect a religious establishment. *Lee* v.

Weisman, 505 U.S. 577, 591 (1992). By barring policies that establish or disavow a particular faith, the Clause protects *every* citizen from the threat of "political tyranny and subversion of civil authority." *McGowan* v. *Maryland*, 366 U.S. 420, 430 & n.7 (1961) (citing James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)).

The Establishment Clause also "protect[s] *States* * * * from the imposition of an established religion by the Federal Government." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (emphasis added). Although that protection may have been broader before the incorporation of the Establishment Clause against the States, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1836 (2014) (Thomas, J., concurring), at a minimum the Clause continues to protect a State's right to make and enforce laws preventing an establishment of religion. *Id.* And when the Federal Government violates that right, the State is owed "special solicitude in [the] standing analysis." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007).

Thus, so long as plaintiffs—whether individuals or States—allege that the Government has taken an action that establishes a favored or disfavored religion, they allege a violation of their *own* right to be free from federal establishments. *McGowan*, 366 U.S. at 430-431. And so long as they can point to a resulting injury that satisfies the requirements of Article III, their claim is reviewable. *Id.*; *see Ariz. Christian Schs. Tuition Org.* v. *Winn*, 563 U.S. 125, 145 (2011) ("If an establishment of religion is alleged to cause real injury to particular individuals, the federal courts may adjudicate the matter.").

Respondents easily clear that bar. They allege that EO-3 establishes a disfavored faith. *See* Part IV.B, *infra*. And they have suffered numerous injuries stemming from that unconstitutional establishment: Respondents have endured "prolonged separation from family members, constraints to recruiting and retaining students and faculty members * * *, and the diminished membership of the Association." Pet. App. 57a. Indeed, the Government conceded during oral argument in the initial Ninth Circuit appeal that "a U.S. citizen with a connection to someone seeking entry"—that is, someone in the individual respondents' *precise* position—would have standing to "make out a constitutional challenge." Oral Argument at 24:28-24:47, *Washington* v. *Trump*, No. 17-35105 (9th Cir. Feb. 7, 2017).

2. The Government has now moved the goalposts. It asserts that respondents may not bring an Establishment Clause challenge unless a government action burdens their own religious practice. That understanding inappropriately transposes precedent about the Free Exercise Clause. The Government's favored case, *McGowan*, proves the point: It held that while the plaintiffs could not bring a Free Exercise Clause claim because "they d[id] not allege any infringement of their own religious freedoms," they *could* bring an Establishment Clause claim based on the "economic injury" they suffered as a result of the state's policy. 366 U.S. at 429-430. Likewise, respondents may bring an Establishment Clause challenge even if they have not suffered an injury that is religious in nature. *See Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709-710 (1985) (retail store may challenge Sabbath-

employment law); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117-118 (1982) (restaurant may challenge law giving church veto over liquor-license applications).

Equally unavailing is the Government's assertion (at 28) that respondents' injuries must result from a law that operates directly on them. That has never been the rule: A plaintiff's injuries need only be "fairly traceable to the defendant's allegedly unlawful conduct." *Hein* v. *Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality op.). Thus, in *McGowan*'s companion case, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961), the Court held that a department store could claim that a Sunday-closing law violated its own Establishment Clause rights, even though the direct victims of the penalties were the store's *employees*. *Id.* at 585, 592. That claim was reviewable because the unconstitutional Sunday-closing laws inflicted concrete injuries on the store, just as this unconstitutional order inflicts concrete injuries on respondents.

3. Finally, respondents' claims pass muster even under the Government's incorrect understanding of what the Establishment Clause requires. EO-3 directly burdens the individual respondents' own religion by separating Muslim-Americans from their family members and denigrating their faith. *See supra* p. 19. And EO-3 impinges on the Association's "religious practice" of welcoming foreigners to their religious community. *Id.*

The Government seeks to diminish the import of the spiritual and dignitary harms respondents suffer, but this Court has found standing based on

lesser injuries. *See, e.g.*, *Lee*, 505 U.S. at 584-585 (observing a "benediction" at graduation is a cognizable injury); *Town of Greece*, 134 S. Ct. at 1817 (taking "offens[e]" at a prayer during a "town board meeting[]" is a cognizable injury).

In suggesting those harms are not cognizable, the Government relies (at 29) on cases disclaiming standing when a plaintiff objects to a policy that allegedly favors members of one faith. *See Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (challenge to a land transfer that allegedly gave preference to Christian institution); *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (challenge to retirement system that "favor[ed] Catholic chaplains"). Respondents' claim is meaningfully different. They assert that they have been "singled out for special *burdens* on the basis of [their] religious calling." *Locke* v. *Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting) (emphasis added). That "indignity" is "so profound that the concrete harm produced can never be dismissed as insubstantial." *Id.*

II. EO-3 EXCEEDS THE PRESIDENT'S AUTHORITY UNDER SECTIONS 1182(f) AND 1185(a).

The Constitution entrusts "[p]olicies pertaining to the entry of aliens * * * exclusively to Congress." *Arizona*, 567 U.S. at 409 (quoting *Galvan*, 347 U.S. at 531). For more than a century, Congress has implemented its immigration power through an "extensive and complex" statutory code—one that "specif[ies]" in considerable detail the "categories of

aliens" who "may not be admitted to the United States." *Id.* at 395.

In 8 U.S.C. §§ 1182(f) and 1185(a), Congress delegated to the President the authority to "suspend the entry" of additional "class[es] of aliens" whose admission he finds "would be detrimental to the interests of the United States." Properly understood, these statutes permit the President to temporarily halt the admission of aliens who share some characteristic that would render their entry harmful to the interests reflected in the immigration laws. And for a century, that is invariably how these statutes have been exercised: to supplement, not to overturn, the immigration scheme Congress carefully crafted.

This President, however, purports to find in these "long-extant statute[s]" a previously "unheralded power" of staggering breadth. *Util. Air Regulatory Grp.* v. *EPA* ("*UARG*"), 134 S. Ct. 2427, 2444 (2014). He claims that Sections 1182(f) and 1185(a) grant the President absolute "discretion" to determine "whether," "when," "on what basis," "for how long," "on what terms," and "who[m]" to exclude from the United States. Br. 31. Relying on that unbridled claim of power, he has issued a proclamation that brazenly inverts the policies of the immigration laws. Whereas Congress deemed nationality discrimination an impermissible basis for exclusion, the President has banned 150 million aliens from the country based on nationality alone. And whereas Congress provided that aliens could gain a *faster* track to admission if their governments cooperated with the United States, the President has announced that aliens *may not obtain admission at all* unless their

governments cooperate in precisely the way required for participation in the Visa Waiver Program.

Congress did not authorize the President to countermand its policies in this manner. Nor could it. If the President possessed the power he claims, he could eradicate Congress's immigration laws with the stroke of a pen, and usurp virtually the whole of the immigration power that the Founders vested in Congress "to secure liberty." *Chadha*, 462 U.S. at 962 (quoting *Youngstown*, 343 U.S. at 635). Congress did not delegate the President that limitless power through the vague terms of Section 1182(f) and 1185(a). If the Constitution's balance of power is to remain intact, EO-3 cannot be upheld.

A. Sections 1182(f) And 1185(a) Permit The President To Temporarily Halt The Entry Of Aliens Whose Admission Would Be Harmful To The Interests Reflected In The Immigration Laws.

Sections 1182(f) and 1185(a) grant a flexible but limited power to the President: They permit him to temporarily halt the entry of a "class of aliens" who share some characteristic harmful to the "interests" reflected in the immigration laws. This reading follows from the plain text of the statute. It accords with the structure of the INA. And it comports with the historical background of both statutes and the unbroken practice of Presidents for nearly a century.

1. a. Start with the text. Section 1182(f) provides in pertinent part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the

> United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants.

8 U.S.C. § 1182(f).

By its plain language, this provision grants the President authority to "suspend the entry of * * * any class of aliens"—that is, to "temporarily" halt entry for a limited span of time. Oxford English Dictionary (3d ed. rev. 2018) ("OED") (defining "suspend" and "period"). And it sets forth a precondition that the President must satisfy in order to invoke that power: He must "find[] that the entry of * * * [a] class of aliens * * * would be detrimental to the interests of the United States."[7]

That precondition has two parts. *First*, to invoke his suspension power, the President must identify a "class of aliens" whose entry would be "detrimental." A "class" is a group that shares "some related properties or attributes in common." OED. And "detrimental," of course, means "harmful." *Id.* Hence, to suspend entry, the President must identify a group of aliens who share "some related * * * attributes" that would render their entry "harmful."

Second, not just any "detriment[]" will do: The President must find that the aliens' entry would be

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[7] The statute also permits the President to "suspend the entry of *all* aliens" if he finds that "the entry of *any* aliens * * * would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f) (emphases added). No President has ever invoked that grave power, and the President did not purport to do so here.

"detrimental to *the interests of the United States*." As the Court has long made clear, "[i]t is a mistaken assumption" that a statute invoking the public interest makes "a mere general reference to public welfare without any standard to guide determinations." *N.Y. Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24 (1932). Rather, this phrase refers to the "polic[ies]" of "the [a]ct" at issue. *Id.*[8] That makes sense: Congress defines "the interests of the United States" through the statutes it enacts. By invoking the Nation's "interests" in Section 1182(f), Congress gave the President authority to further the policies embodied in the immigration laws—not to subvert what Congress itself deemed to be in "the interests of the United States."

This interpretation accords with the construction the Court has given "similarly broad language" throughout the immigration laws. *INS* v. *Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 193 (1991). In *Mahler* v. *Eby*, 264 U.S. 32 (1924), the Court held that a statute authorizing officers to exclude aliens they "find[]" to be "undesirable residents of the United States" only permitted the exclusion of those aliens whose residence was contrary to the "declared policy of Congress." *Id.* at 40. In *Kent* v. *Dulles*, 357 U.S. 116 (1958), the Court held that a statute authorizing the President to "designate and

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[8] *See also, e.g.*, *Gulf States Utils. Co.* v. *Fed. Power Comm'n*, 411 U.S. 747, 759-760 (1973) (statute requiring agency to act in the "public interest" requires it to pursue the "purposes of the Act"); *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 216 (1943) (same); *United States* v. *Lowden*, 308 U.S. 225, 230 (1939) (same).

prescribe" passport rules "for and on behalf of the United States" permitted refusals on those grounds consistent with the statute's "purpose." *Id.* at 123, 128. And in *National Center for Immigrants' Rights*, the Court explained that the INA's facially unqualified authorizations to question and detain aliens permitted only those actions consistent with "the 'Act as a whole.'" 502 U.S. at 193; *see United States* v. *Witkovich*, 353 U.S. 194, 199-200 (1957); *Carlson* v. *Landon*, 342 U.S. 524, 543-544 (1952); *see also Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) (explaining that the Court has "read significant limitations into other immigration statutes").

So too here, Section 1182(f)'s authorization to exclude aliens whose entry is "detrimental to the interests of the United States" does not confer "limitless" power, but requires the President to act consistent with "the legislative scheme." *Witkovich*, 353 U.S. at 200. Hence, the President may suspend the entry of aliens whose admission would be harmful to the "interests" reflected in the INA. Or, he may suspend aliens who pose a threat that Congress has not addressed, but whose exclusion would be consistent with congressional policy—for instance, aliens who threaten the Nation in a diplomatic crisis or some other exigency. But the President may not suspend entry based on a quality that Congress has decided does *not* render aliens' admission "detrimental to the interests of the United States."

b. The text of Section 1185(a) does not permit the President to circumvent these limits. That provision states in general terms that aliens cannot "depart from or enter * * * the United States except under such reasonable rules, regulations, and orders, and

subject to such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1). Section 1185(a) does not specifically address the President's authority to suspend entry. And it expressly requires any entry rules the President prescribes to be "reasonable." *Id.* As Justice Scalia explained, where "a general authorization and a more limited, specific authorization exist side-by-side * * * [t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Because Section 1182(f) is the more specific provision governing suspension, the President must comply with its terms.

2. The structure of the INA reinforces the textual limits on the President's suspension power. Section 1182(f) appears after a long list of "[c]lasses of aliens" that Congress deemed inadmissible. 8 U.S.C. § 1182(a). Each of those classes consists of a group of aliens united by some characteristic—indigency, polygamy, unlawful entry—that renders their admission harmful in the eyes of Congress. *See id.* § 1182(a)(4), (9), (10)(A). Section 1182(f) then gives the President residual authority to identify additional "class[es] of aliens." Under ordinary principles of construction, Section 1182(f) thus grants the President authority to suspend classes "similar in nature" to those identified in Section 1182(a)—not to exclude wholly dissimilar "class[es]," or to override the careful enumeration of classes contained in the preceding list. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001); *see Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (Ginsburg, J.) (stating that Section 1182(f) "provides a safeguard against the danger posed by any particular case or

class of cases that is *not* covered by one of the categories in section 1182(a)" (emphasis added)), *aff'd by equally divided Court*, 484 U.S. 1 (1987).

The Act as a whole confirms this structural inference. The INA sets forth a comprehensive immigration scheme, which prescribes in exhaustive detail the grounds on which aliens may obtain entry and the procedures they must follow to gain admission. *See, e.g.*, 8 U.S.C. §§ 1101(a)(15), 1153, 1182, 1201-02. If the President could suspend the entry of any aliens he found harmful, irrespective of the policies of the INA, he could subvert—indeed, overthrow—virtually the entirety of this statutory scheme. With the stroke of a pen, he could end the family-preference system, reimpose national origin quotas, or dramatically steepen the barriers to admissibility Congress imposed. If the President thought immigration undesirable, he could simply ban "all aliens," and end the immigration system entirely. *Id.* § 1182(f).

It is inconceivable that Congress intended to grant the President a blank check to refashion the INA in this manner—let alone through the opaque language of a subsection buried at the end of Congress's detailed list of inadmissible classes. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). And it does not authorize the Executive to "transform the carefully described limits on [its] authority * * * into mere suggestions." *Gonzales* v. *Oregon*, 546 U.S. 243, 260-261 (2006).

3. This conclusion is consistent with the historical understanding of the President's suspension authority. The immigration laws have vested the President with authority to suspend entry since 1918. *See* Act of May 22, 1918, § 1(a), 40 Stat. 559, 559 (authorizing the President to exclude aliens when "the public safety requires [it]"). For decades, Presidents invoked that authority to exclude "classes of aliens" they deemed "prejudicial to the interests of the United States." 22 C.F.R. § 58.47 (1941); *see* Proc. 2523, § 3 (1941); Proc. 1473, § 2 (1918). Those classes invariably consisted of well-defined groups of foreign nationals engaged in conduct harmful to the interests reflected in the immigration laws, such as spies, subversives, and the statutorily inadmissible. *See* 22 C.F.R. § 58.47 (1941); 58 Cong. Rec. 7303 (1919); H.R. Rep. No. 65-485, at 3 (1918).

In 1941, Congress amended the President's suspension authority to provide, for the first time, that the President could exclude aliens harmful to "the interests of the United States." Act of June 21, 1941, § 1, 55 Stat. 252, 253. When debating that measure, several members of Congress expressed concern that the President would construe these words just as the Government now does—as "giv[ing] the President unlimited power, under any circumstances, to make the law of the United States," 87 Cong. Rec. 5326 (1941) (statement of Sen. Taft), or to "override the immigration laws," *id.* at 5050 (statement of Rep. Jonkman). The bill's sponsors and the State Department assured them, however, that the statute "would *only* operate against those persons who were committing acts of sabotage or doing something inimical to the best interests of the United States,

under the act as it was in operation during [World War I]." *Id.* at 5049 (statement of Rep. Eberharter) (emphasis added); *see id.* at 5052 (statement of Rep. Johnson); *id.* at 5386 (statement of Sen. Van Nuys); *id.* at 5048 (statement of Ruth Shipley, Director, Passport Division, Dep't of State). And Presidents Roosevelt and Truman fulfilled that assurance, enforcing the law in the same limited manner as their predecessors. *See* 22 C.F.R. § 58.47 (1941) (excluding aliens whose entry is antithetical to the "purpose[s]" of the immigration laws); *see also* Proc. 2850 (1949); 22 C.F.R. § 58.53 (1945).

In 1952, Congress enacted Sections 1182(f) and 1185(a) against this backdrop. Moreover, it borrowed the words of the precursor statutes, proclamations, and regulations nearly verbatim, and codified that language in Section 1182(f). *Compare* 8 U.S.C. § 1182(f), *with* 22 C.F.R. § 58.47 (1941), *and* Proc. 1473. It therefore stands to reason that Congress wished to confer a power comparable to the one that Presidents had exercised for decades—not a dramatically broader power that no President had ever exercised. *See Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (explaining that when Congress reenacts words with a settled meaning, they "bring[] the old soil with [them]"); *see also Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981) (construing immigration power in light of its history); *Kent*, 357 U.S. at 127-128 (same); *Mahler*, 264 U.S. at 40 (same).

What little legislative history exists surrounding the 1952 enactments supports that understanding. In debating Section 1182(f), the INA's opponents expressed concern, much as in 1941, that the bill would give the President "an untrammeled right * * *

to suspend immigration entirely." *E.g.* 98 Cong. Rec. 4423 (1952) (statement of Rep. Celler). But the bill's principal sponsor in the House, Representative Walter, explained that the statute was designed primarily to "permit the President" to suspend entry in circumstances, like "an epidemic" or an economic crisis, in which "it is impossible for Congress to act." *Id.*[9]

4. Since the enactment of Sections 1182(f) and 1185(a), Presidents have consistently exercised their suspension authority in a manner consistent with the textual and historical limits on that power. *See Dames & Moore*, 453 U.S. at 686 (explaining that "systematic, unbroken, executive practice * * * may be treated as a gloss" on presidential power).

Virtually every suspension order since 1952 has excluded groups of aliens who shared some characteristic expressly deemed harmful by the immigration laws. Most such proclamations have suspended the entry of aliens who engaged in acts with "serious adverse foreign policy consequences for the United States," such as impeding an international peace process. 8 U.S.C. § 1182(a)(3)(C).[10] Other orders

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[9] Peculiarly, the Government takes up the view of the statute's opponents and argues that their direst fears were *correct*. Br. 42-43. But the "fears and doubts of the opposition" are never a good guide to a statute's meaning. *Bryan* v. *United States*, 524 U.S. 184, 196 (1998). And those fears are particularly uninformative here, where the law's supporters expressly rejected them and gave assurances that the President's suspension power would be limited in scope.

[10] *See, e.g.*, Proc. 7524 (2002); Proc. 7359 (2000); Proc. 6569 (1993); Proc. 5377 (1985).

have suspended aliens engaged in acts of criminality specifically forbidden by the immigration laws, such as "human trafficking," *id.* § 1182(a)(2)(H), and grave human rights abuses, *id.* § 1182(a)(3)(E)(ii)-(iii).[11] And two orders have prohibited "[i]llegal entrants" from entering the United States by sea. *Id.* § 1182(a)(6).[12]

The sole remaining suspension order responded to an exigency that the immigration laws do not address, and did so in a manner fully consistent with congressional policy. In 1985, Cuba announced that it would no longer comply with an immigration treaty normalizing migration with the United States; then, in 1986, it began actively "facilitating illicit migration to the United States." Proc. 5517 (1986); *see* 86 U.S. Dep't of State Bull. No. 2116, *Cuba: New Migration and Embargo Measures* 86-87 (Nov. 1986) ("*Cuba Bulletin*"). President Reagan swiftly responded to this latter breach by suspending the United States' compliance with the treaty "pending the restoration of normal migration procedures." Proc. 5517. This order thus excluded a group of aliens who themselves were violating a treaty with the United States. And it did so in a manner consistent with congressional policy, which expressly favored normalizing relations with Cuba "on a reciprocal basis." Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. 95-105, § 511 (1977).[13]

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[11] *See* Proc. 8342 (2009); Proc. 8697 (2011).

[12] *See* Exec. Order No. 12,807 (1992); Proc. 4865 (1981).

[13] The Government has also cited President Carter's order authorizing "restrictions" on Iranian nationals during the fast-

B. EO-3 Exceeds The Limits On The President's Suspension Authority.

EO-3 grossly exceeds the long-established limits on the President's suspension authority. It purports to indefinitely exclude a sprawling group of 150 million aliens solely on the ground that they are nationals of countries that do not adequately cooperate with the United States. Every aspect of this suspension order—from the sprawling "class" it covers, to its brazen inversion of the statutory scheme Congress designed, to its indefinite nature—flouts the limits in Sections 1182(f) and 1185(a).

1. As an initial matter, EO-3 does not identify any "class of aliens" who share some characteristic that would render their entry "detrimental." 8 U.S.C. § 1182(f). Rather, the order excludes a vast group of 150 million aliens who share nothing in common but nationality. There is no contention that all of these individuals—from infants and the infirm to persons who have lived abroad for decades—are criminals, "likely terrorists," or otherwise harmful to the United States. Br. 37. And this vastly overbroad group does not resemble the carefully tailored "[c]lasses" of

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breaking Iran hostage crisis. Exec. Order No. 12,172 (1979). That order did not suspend entry or invoke Section 1182(f). Moreover, the Office of Legal Counsel advised the President that he could lawfully suspend entry of Iranian nationals because there was evidence that Iranians seeking entry planned to "undertake violent action in this country" or engage in "demonstrati[ons]" that would lead to "internal problems and violence"—not simply because Iran itself had engaged in conduct of which the United States disapproved. Immigration Laws and Iranian Students, 4A Op. O.L.C. 133, 140 (1979).

harmful aliens listed in Section 1182(a) or subject to every prior exclusion order since 1918.

The Government suggests that the harmful characteristic that unites all of these nationals is that they cannot adequately be vetted. Br. 37. But the face of the order flatly refutes that assertion. EO-3 permits nationals from nearly every banned country to travel to the United States on a variety of non-immigrant visas. Pet. App. 131a-137a (§§ 2(a)-(h)); *see* Br. 57 (explaining that non-immigrant visas account for up to 90% of admissions). Moreover, since EO-3 went into effect, the Government has admitted thousands of otherwise banned nationals on such visas.[14] The Government does not claim it is somehow easier to vet aliens traveling on these particular non-immigrant visas than others. *See* 8 U.S.C. § 1202(a)-(d). Hence, the Government is not incapable of adequately vetting all or even most of the excluded "class" of aliens; it is successfully vetting and admitting many of them every day.

The Government also claims that the President has excluded all of these aliens to "encourage" their governments to cooperate more with the United States. Br. 34 (quoting Pet. App. 128a-129a (§ 1(h)(i)). But this rationale does not state a reason why admitting any part of the banned "class of aliens"—let alone all of it—would be "*detrimental* to the interests of the United States." That language demands a finding that the *entry* of the relevant class would inflict some *harm* on the United States.

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[14] *See* U.S. Dep't of State, *Monthly Nonimmigrant Visa Issuance Statistics*, https://goo.gl/SLkwbK.

It does not permit exclusion on the ground that *denying* entry would confer some *benefit*. Every exclusion order places some pressure on the target government, and so any suspension could be justified on the ground that it will help extract policy concessions from a foreign power. Permitting the President to order a suspension on this basis would gut the textual limits Congress imposed.[15]

2. EO-3 also fails to identify any respect in which the entry of the targeted aliens would be detrimental to the "interests" reflected in the immigration laws. On the contrary, every ground on which EO-3 relies to select aliens for exclusion is one that Congress has made abundantly clear it does not think renders aliens "detrimental to the interests of the United States."

a. By its terms, EO-3 excludes aliens on the basis of their *nationality*—a characteristic that the immigration laws overwhelmingly deem "irrelevant to [an] alien's fitness to reside in" the United States. *Judulang* v. *Holder*, 565 U.S. 42, 53 (2011). In 1965, Congress abolished the "national origins system," and banned nationality discrimination in the issuance of immigrant visas. 8 U.S.C. § 1152(a)(1)(A).

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[15] The Government argues (at 37) that prior suspension orders were designed to impose "diplomatic pressure." But in every prior case, the excluded aliens had themselves engaged in activities adverse to U.S. interests, and permitting their entry would have facilitated or enabled that wrongful conduct. *See supra* pp. 40-41; *see also Immigration Law and Iranian Students*, 4A Op. O.L.C. at 140. The Government does not identify any comparable "detriment[]" from the aliens' admission here.

Since then, courts have consistently recognized that nationality is a deeply disfavored basis for making exclusion decisions. In 1966, Judge Friendly explained that a person's "race or group" is generally an "impermissible basis" for exclusion under the statutory scheme. *Wong Wing Hang* v. *INS*, 360 F.2d 715, 719 (2d Cir. 1966). And in *Jean* v. *Nelson*, 472 U.S. 846 (1985), this Court held that because nationality is generally a disfavored characteristic under the immigration laws, immigration officers must implement grants of "broad statutory discretion * * * without regard to race or national origin." *Id.* at 857.

b. The Government offers no legally valid justification for excluding aliens on the basis of this deeply suspect criterion. It asserts that admitting nationals of the banned countries would be detrimental because those countries do not satisfy various "baseline" criteria for cooperating with the United States. Pet. App. 124a-125a, 129a. But Congress considered exactly those same criteria and reached a different conclusion.

In Section 1187, Congress established a fast-track admissions system, known as the Visa Waiver Program, for nationals of countries that cooperate with the United States in various respects. 8 U.S.C. § 1187(a). Pursuant to this program, a country's nationals may travel to the United States for brief periods without obtaining a visa if, among other things, the country (1) issues electronic passports and "[r]eport[s] lost and stolen passports," *id.* § 1187(a)(3), (c)(2)(B), (D); (2) "share[s] information" about the threats posed by its "nationals * * * traveling to the United States," *id.* § 1187(c)(2)(F); and (3)

accepts nationals subject to final orders of removal, *id.* § 1187(c)(2)(E). In 2015, Congress amended the statute specifically to provide that "terrorist safe haven[s]"—such as Iraq and Syria—could not participate in the Visa Waiver Program. *Id.* § 1187(a)(12). But Congress has made clear that nationals may still be admitted to the United States if their governments do not satisfy the program's criteria; they simply must undergo the rigorous, individualized process the INA generally prescribes for obtaining a visa. *Id.* § 1187(a); *see id.* § 1187a (authorizing "assistance * * * to countries that do not participate in the visa waiver program").

EO-3 flips that judgment on its head It evaluates countries according to the same "baseline" criteria as Section 1187, copied from the statute almost word-for-word: It examines whether a country (1) ensures the integrity of travel documents by "issu[ing] electronic passports" and "report[ing] lost and stolen passports"; (2) "makes available * * * known or suspected terrorist and criminal-history information upon request"; and (3) accepts nationals subject to final orders of removal and is a "known or potential terrorist safe haven." Pet. App. 124a-125a (§ 1(c)). Yet whereas Section 1187 provides that a country that fails to satisfy these criteria is excluded from *the Visa Waiver Program*—but its nationals may continue to seek admission through normal processes—EO-3 provides that the same country is excluded from the immigration system *altogether*.

That flouts the balance that Congress struck. Far from just addressing "similar concerns," Br. 45, the President and Congress considered *precisely* the same criteria, and reached contradictory judgments

as to whether those criteria render aliens "detrimental to the interests of the United States." If the President could invert Congress's policies in this manner, he could override countless other immigration provisions that go so far and no further: The President could determine, for instance, that aliens who enter unlawfully should be barred from reentry for life, not just ten years, 8 U.S.C. § 1182(a)(9)(B); or that an alien who lacks a high school education is ineligible not only for a diversity visa but for any immigrant visa at all, *id.* § 1153(c)(2)(A). Section 1182(f) cannot permit such wholesale revision of the immigration laws.

c. Finally, even setting aside the Visa Waiver Program, the order departs from Congress's judgment as to whether it is "detrimental to the interests of the United States" to admit nationals of countries that do not cooperate with the United States in vetting their nationals. Congress designed the modern immigration system with full and explicit awareness that many aliens seeking admission are nationals of countries that provide little or no reliable information to the United States.[16] The immigration laws repeatedly acknowledge this basic reality: They

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[16] *See, e.g.*, Pub. L. 83-203, §§ 2(b), 4 (1953) (authorizing admission of nationals of "the Union of Soviet Social Republics, or other Communist, Communist-dominated, or Communist-occupied area of Europe"); H.R. Rep. No. 83-974, at 19 (1953) (explaining that the immigration laws provide for the admission of aliens whose "records * * * remain in the hands of Communists"); H.R. Rep. No. 82-1365, at 17 (1952) (describing longstanding problem of aliens traveling to the United States on "[f]raudulent passports").

recognize that aliens may seek admission from "state sponsors of terrorism," *id.* §§ 1184(c)(4)(F), 1202(h)(2)(D), 1735(a); that some applicants for admission are nationals of countries that pose "a substantial risk of submitting *inaccurate* information in order to obtain a visa," *id.* § 1202(h)(2)(F)(i) (emphasis added); and that aliens may attempt to seek entry using "altered and counterfeit passports and visas" obtained from "corrupt government officials," Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 720(a)(3); *see also* 8 U.S.C. §§ 1187(a), 1187a.

Congress's solution to this longstanding problem has never been to exclude nationals of these countries wholesale. Rather, Congress designed a rigorous and individualized vetting system to ensure that the United States can safely admit aliens regardless of whether their governments cooperate with the United States. That system places the burden on each individual alien to prove her admissibility. 8 U.S.C. §§ 1202(a)-(d), 1361; *see* 22 C.F.R. §§ 41.11(a), 42.41. It provides that each visa applicant must produce extensive, "certified" records of her identity, background, and criminal history. 8 U.S.C. § 1202(b), (d); *see* 22 C.F.R. §§ 42.65, 41.105. And it states that, if an alien fails to produce any of these documents, or if an officer cannot confirm their "authentic[ity]," the officer must deny the alien's application. 22 C.F.R. § 42.65(e); 8 U.S.C. § 1201(g). Since September 11, 2001, Congress has repeatedly strengthened these vetting procedures to guard against any risk of aliens who seek admission through fraudulent or unreliable documentation. *See, e.g.*, Intelligence Reform and Terrorism Preven-

tion Act of 2004, § 7208 (8 U.S.C. § 1365b) (establishing program requiring aliens to submit biometric information); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, § 304 (establishing procedures to detect known or potential terrorists).[17]

EO-3 rejects this system root and branch. It finds that a characteristic endemic to the immigration system for decades—that an alien may seek to travel here from an uncooperative or hostile country—is grounds for halting foreign entry entirely. It deems insufficient the numerous means that Congress identified to address this longstanding issue. And it guts the finely reticulated scheme Congress set for determining inadmissibility: Rather than deeming an alien inadmissible only if there is a "reasonable likelihood" that he is a terrorist, or if a consular officer "know[s] or has reasonable ground to believe" he is a criminal, 8 U.S.C. § 1182(a)(2), (3)(B), the proclamation implements a blanket ban on entry. *Cf. Kerry* v. *Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (describing this statute's "specific criteria for determining terrorism-related inadmissibility").

In place of Congress's system, the President established his own. EO-3 sets its own standard of admission, Pet. App. 131a-137a (§ 2); its own vetting requirements, Pet. App. 139a-142a (§ 3(c)); and its own

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[17] *See also* Consolidated Appropriations Act, 2016, Pub. L. 114-113, div. O, tit. II, § 202 (2015); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, §§ 701-731.

warren of exceptions and waivers, Pet. App. 137a-139a (§ 3(a)-(c)). It looks, in fact, much "like a statute," *Youngstown*, 343 U.S. at 588—just not the one Congress wrote. *Cf. Hamdan* v. *Rumsfeld*, 548 U.S. 557, 620-625 (2006).

The President has not claimed that this divergence from the fundamental policies reflected in the immigration laws is justified by some exigent circumstance that Congress did not consider, or some breakdown in the vetting system Congress designed. Indeed, the President has consistently refused—in spite of the Ninth Circuit's exhortations—to identify any respect in which "the individualized adjudication process is flawed." Pet. App. 95a. Instead, the President complains of a feature endemic to the immigration system for decades, which Congress has judged insufficient to merit excluding entire nationalities from the country. If our system of separation of powers means anything, it is that the President cannot openly "contraven[e] *** the will of Congress" in this manner. *Dames & Moore*, 453 U.S. at 669.

3. EO-3 exceeds the President's statutory power in one last respect: It does not "suspend" aliens for a limited "period" of time. 8 U.S.C. § 1182(f); *see* Amicus Br. William Webster et al. 5-13; Pet. App. 26a-27a. Rather than imposing a temporary and time-limited suspension, as these words require, EO-3 is slated to last indefinitely. And because the justifications it gives for its "suspension" are chronic conditions that have existed for decades, the order's ban is likely to remain in place far into the future. *See* Pet. App. 131a-137a (§ 2).

C. The President's Exercise Of Sections 1182(f) And 1185(a) Raises Grave Constitutional Concerns.

The Constitution confirms that EO-3 cannot stand. For over a century, this Court has recognized that the Constitution entrusts the immigration power "exclusively to [C]ongress." *Head Money Cases*, 112 U.S. at 591; *see supra* pp. 4-5. Yet if Sections 1182(f) and 1185(a) granted the President the limitless power over immigration he claims—to exclude "who[m]" he wishes, on whatever "basis" he chooses, and in defiance of the policies of the immigration laws, Br. 31—they would represent a wholesale "[a]bdication" of Congress's power to the President. *Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Such a sweeping delegation would raise the most profound constitutional concerns. It would vest the President with unfettered discretion to set the Nation's rules of entry, with "literally no guidance for the exercise of [that] discretion"—let alone the "substantial guidance" required for a delegation that "affect[s] the entire national economy." *Whitman*, 531 U.S. at 474-475. Furthermore, by permitting the President to subvert or override provisions of the immigration laws with which he disagrees, it would give the President an effective line-item veto over the INA. *Cf. Clinton*, 524 U.S. at 420-421. It is highly doubtful Congress could give the President such powers. *Id.* And the Court should not infer that Congress so dramatically upset the constitutional balance through the vague language of Sections 1182(f) and 1185(a). *See Bond* v. *United States*, 134 S. Ct. 2077, 2088-89 (2014). Moreover, given the

Article I, Section 7 veto power the President possesses, it is unlikely that Congress could—as a practical matter—redress a court decision that granted the President powers beyond what Congress intended.

In defense of the President's unprecedented claim to power, the Government cites a single case: *Knauff*. *See* Br. 2, 45-47. But that solitary opinion cannot possibly bear the weight the Government places on it. Its only holding was that the President could exclude a German national during "the national emergency of World War II" without providing her a hearing in which to review classified information relied on to exclude her. 338 U.S. at 544. The Court did not address the extent of the President's exclusion power outside of that wartime context, nor purport to overturn its longstanding position that the immigration power is entrusted "exclusively to [C]ongress." *Head Money Cases*, 112 U.S. at 592; *see Arizona*, 567 U.S. at 409; *Fiallo*, 430 U.S. at 796; *Galvan*, 347 U.S. at 531. And no case since *Knauff* has repeated its characterization of the President's constitutional authority, or followed its suggestion that immigration rules are free from normal nondelegation constraints. *See Mahler*, 264 U.S. at 40 (construing exclusion statute to avoid nondelegation concerns); *see also Carlson*, 342 U.S. at 543-544; *Zemel* v. *Rusk*, 381 U.S. 1, 17-18 (1965).

Furthermore, even on its own terms, *Knauff* does not support the President's boundless claim of immigration authority. The court merely stated that the Constitution permits Congress to delegate to the Executive "the duty of specifying *the procedures* for carrying out the congressional intent," and that the Executive shares authority to "prescribe[] a *proce-*

dure concerning the admissibility of aliens." 338 U.S. at 542-543. It did not state that Congress may give the President untrammeled power to set the substantive requirements for entry to the country, let alone to overturn Congress's own judgments on the question. *Cf. Fiallo*, 430 U.S. at 796 (stating that "the particular classes of aliens that shall be denied entry" is a "matter[] *solely* for the responsibility of the Congress" (emphasis added)). And the Court's subsequent precedents cast grave doubt on the claim that the Constitution vests the President with inherent "foreign affairs" authority of that magnitude. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2089-90 (2015).

EO-3 is therefore irreconcilable with our laws and our constitutional system of divided powers. This conclusion rests on neutral principles, not politics. *See, e.g.*, Amicus Br. William Webster et al.; Amicus Br. Evan McMullin et al.; Amicus Br. Former National Security Officials; Amicus Br. Retired Generals and Admirals; Amicus Br. CATO Institute. If upheld, EO-3 would reduce the immigration code to mere suggestions defeasible at the President's will. And it would place in the President's hands a "loaded weapon ready for the hand of any authority" that wishes to reshape or abandon the immigration system Congress designed. *Korematsu* v. *United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

III. EO-3 VIOLATES SECTION 1152(a)(1)(A).

EO-3 also violates 8 U.S.C. § 1152(a)(1)(A). That statute provides that "no person shall * * * be discriminated against in the issuance of an immigrant

visa because of the person's race, sex, nationality, place of birth, or place of residence." As Judge Sentelle has explained, "Congress could hardly have chosen more explicit language" in "unambiguously direct[ing] that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 473.

EO-3 flouts that command. It provides that "nationals" of targeted countries may not be "issu[ed] * * * a visa" unless they satisfy the stringent requirements for obtaining a case-by-case waiver. Pet. App. 131a-137a, 140a (§§ 2, 3(c)). The proclamation therefore requires consular officers to deny immigrant visas to millions of individuals "because of * * * [their] nationality," mandating precisely the form of discrimination Section 1152(a)(1)(A) forbids.

1. The Government's labored attempts to show otherwise ignore the plain text. The Government's principal argument is that despite its categorical language, Section 1152(a)(1)(A) really means only that the Government cannot discriminate against persons "*within* the universe of aliens who have not been barred from entering the country or receiving a visa." Br. 50. There is no textual basis for that assertion. Section 1152(a)(1)(A) provides that "*no* person shall * * * be discriminated against in the issuance of an immigrant visa"; it does not exempt some vast "universe" of aliens from the scope of its protection.

The Government also suggests (at 48-50) that it does not discriminate in the "*issuance* of an immigrant visa" if it deems aliens *ineligible* for immigrant visas because of their nationality. But an alien is "discriminated against in the issuance of an immi-

grant visa" whenever she is refused a visa because of her nationality. It does not matter whether that refusal is couched as a finding of ineligibility, a determination of inadmissibility, or an exercise of discretion. Indeed, while the Government purports to find support for its position in Section 1201(g), that provision states that a consular officer should not issue a visa if it appears that an alien is "ineligible to receive" it. 8 U.S.C. § 1201(g). It therefore makes clear that eligibility determinations are part of the visa issuance process, reinforcing that nationality-based eligibility determinations are forbidden.

Equally unavailing is the Government's contention (at 50-51) that Section 1152(a)(1)(A) is inapplicable because EO-3 limits *entry*, not the issuance of visas. As EO-3 acknowledges, and the Government admits, the proclamation's supposed "entry" restrictions are enforced by denying visas. *See* Pet. App. 140a (§ 3(c)(iii)) (explaining that nationals must obtain a waiver to secure the "issuance of [an immigrant] visa"); *see* Br. 51 (same). Moreover, the only purpose of a visa is to enable entry. The Government discriminates in visa issuance by limiting disfavored nationalities to visas that have no effect, just as an employer discriminates in hiring if it only hires African-Americans for jobs that receive no pay.

The Government strays even farther afield in claiming (at 50) that Section 1152(a)(1)(A) applies to "consular officers and other government officials" but not the President. The statute does not restrict the conduct of particular government officials; it guarantees that "*no person shall* * * * *be discriminated against* in the issuance of an immigrant visa" because of her "nationality." The President infringes

that right, just as surely as any other officer, by releasing an order blocking the issuance of immigrant visas based on nationality. In any event, EO-3 fails even under the Government's cramped reading. The proclamation carries out its discrimination by directing "consular officers and other government officials" to deny visas to nationals of particular countries. *See* Pet. App. 137a-140a (§ 3). EO-3 thus requires discrimination by the very persons the Government admits are bound to adhere to the statute.

2. Section 1152(a)(1)(A)'s purpose confirms that the Government's reading is untenable. It is common ground that Section 1152(a)(1)(A) "was designed to eliminate the prior country-based quota system." Br. 52; *see* H.R. Rep. No. 89-745, at 8. In enacting Section 1152(a)(1)(A), Congress intended that "favoritism based on nationality w[ould] disappear," and that "[f]avoritism based on individual worth and qualifications w[ould] take its place." 111 Cong. Rec. 24,226 (1965) (statement of Sen. Kennedy). As President Johnson put it, "a nation that was built by the immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?'" Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964), https://goo.gl/Cvvq15.

The Government's reading would subvert this objective. It would permit the President to revive the national origin system with the stroke of a pen, simply by deeming aliens from disfavored nationalities "detrimental to the interests of the United States" and excluding them under Section 1182(f).

Likewise, consular officers could deny aliens immigrant visas on the basis of their nationality (or their race or sex) simply by packaging that discrimination as a reason for deeming them "inadmissible" under one of Section 1182's open-ended categories. It is inconceivable that Congress intended this landmark civil rights statute to be reduced to a rule of bureaucratic etiquette, forbidding discrimination during the ministerial act of handing over a visa and nowhere else.

Indeed, the Government admits as much. It acknowledges the President cannot "use Section 1182(f) or 1185(a)(1) to revive the quota system"; that "would contradict Section 1152(a)(1)'s core purpose." Br. 52. That is a welcome concession, but it gives away the game. If Section 1152(a)(1)(A) bars the President from imposing national-origin quotas, then it follows that all of the Government's textual arguments are wrong, too: The statute would not prohibit quotas if its reach was limited to aliens "who have not been barred from entering the country or receiving a visa," Br. 50, or if the provision restrains consular officers but not the President.

3. The Government fares no better with its contention that Sections 1182(f) and 1185(a) *supersede* the limits imposed by Section 1152(a)(1)(a), and thus permit the President to ignore the statute's restrictions entirely.

Every applicable canon of statutory interpretation counsels otherwise. *First*, Section 1152(a)(1)(A) is considerably more specific than Sections 1182(f) and 1185(a). Whereas Section 1152(a)(1)(A) prohibits a discrete action—discrimination on the basis of na-

tionality—Sections 1182(f) and 1185(a)(1)(A) grant broad (although not limitless) authority to "suspend" the entry of a class of aliens, 8 U.S.C. § 1182(f), and to prescribe "reasonable" restrictions on entry, *id.* § 1185(a)(1). It is "axiom[atic]" that "a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Law* v. *Siegel*, 134 S. Ct. 1188, 1194 (2014). Moreover, that canon dispels the Government's claim that construing Section 1152(a)(1)(A) as a limit on the President's suspension power would amount to an "implied repeal[ ]" of Sections 1182(f) and 1185(a)(1). Br. 55-56. A law "does not stand repealed" simply because a "subsequently enacted" statute narrows the discretion it grants. *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 185 (2012) (explaining "the principle behind the general/specific canon" is that "the two provisions are not in conflict," because "[t]he specific provision does not negate the general one entirely").

Second, Congress expressly "[e]xcept[ed]" several provisions from Section 1152(a)(1)(A)'s scope—but not, notably, Sections 1182(f) and 1185(a). 8 U.S.C. § 1152(a)(1)(A). When Congress includes "express exception[s]" in a statute, the "impli[cation]" is that it intended "no *other*[s]." *Jennings*, 138 S. Ct. at 844. That implication is particularly strong here. Congress stated that nationality discrimination was authorized only as "*specifically* provided in" the listed exceptions. 8 U.S.C. § 1152(a)(1)(A) (emphasis added). And it included in the list of exceptions several provisions of surpassing obscurity, including a subsection that enables "Panamanian national[s]

* * * honorably retired from United States Government employment in the Canal Zone" to obtain special immigrant visas. 8 U.S.C. § 1101(a)(27)(F). It is implausible that Congress would have taken care to exclude such provisions from Section 1152(a)(1)(A) while neglecting to mention that it wished the President to retain power to ban nationalities whenever he wished.[18]

Third, Section 1152(a)(1)(A) was enacted in 1965, whereas Sections 1182(f) and 1185(a)(1)(A) were enacted in 1952. The Government suggests (at 56) that Section 1185(a)(1) was amended more recently. That is simply wrong: Congress amended Section 1152(a)(1)(A) in 1996—18 years after the amendment to Section 1185(a)—specifically to add another exception to the statute's scope. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 633 (8 U.S.C. § 1152(a)(1)(B)). As the "later enacted provision," as well as the more specific one, Section 1152(a)(1)(A) "win[s] out" in the case of any conflict. *Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 766 (2004).

4. Finally, the Government rests considerable weight on the claim that Section 1152(a)(1)(A) would

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[18] The Government protests (at 56) that the list of exceptions cannot be exhaustive because other provisions ostensibly permit nationality discrimination. But the provisions the Government points to permit nothing of the kind. By its terms, 8 U.S.C. § 1253(d) permits the Government to halt visa processing *in* a particular country; it does not permit the Government to stop issuing visas to nationals of that country, should they present themselves at a consulate abroad. Meanwhile, Section 1182(a)(3)(C)(i) does not mention nationality at all.

raise constitutional concerns if it prohibited the President from drawing nationality distinctions to prevent an imminent threat of terrorism or when the country is "on the brink of war." Br. 54. But Congress has expressly authorized the President to exclude "natives" and "citizens" of a country that "threaten[s]" war against the United States. 50 U.S.C. § 21. And no party interprets Section 1152 to limit the President's power in the face of a comparable emergency. Section 1152(a)(1)(A) bars "discrimination," a well-established term in the law that does not extend to restrictions closely drawn to address a "compelling" exigency. *LAVAS*, 45 F.3d at 473; *see Sekhar*, 133 S. Ct. at 2724 (a word with a settled legal meaning "brings the old soil with it").

Historical practice confirms this understanding: The only two examples of nationality-based restrictions the Government has identified were tailored to specific fast-breaking exigencies. In 1986, President Reagan restricted entry by some Cuban nationals after Cuba had breached an immigration agreement, lesser sanctions had failed, and Cuban officials had begun "facilitating illicit migration to the United States" and abusing the visa process to "traffic[] in human beings." Proc. 5517; *Cuba Bulletin* at 86-87. In 1979, President Carter responded to a severe "international cris[i]s"—the imprisonment of over 50 Americans as hostages—by declaring a "national emergency" and announcing a host of sanctions against Iran, *Dames & Moore*, 453 U.S. at 662, 669, including visa restrictions, Exec. Order No. 12,172, § 1-101. Even then, the President only delegated his Section 1185(a) power "to prescribe limitations and exceptions on the rules and regula-

tions" governing entry; he did not purport to exclude any nationals directly. *Id.*

There is no comparable exigency here: The President has not pointed to anything remotely resembling a war, emergency, or international crisis. *See supra* p. 50. Under any conceivable definition, EO-3 engages in "discrimination *** because of *** nationality."

IV. EO-3 VIOLATES THE ESTABLISHMENT CLAUSE.

A. The Judicial Branch Must Enforce The Constitution.

If this Court holds that Congress has delegated to the President the exceptionally broad policymaking powers he claims, it must assess whether he exercised those powers in compliance with the Establishment Clause. Indeed, judicial review of respondents' constitutional challenge becomes particularly important. By placing the immigration power in the hands of a "deliberate and deliberative" body, *Chadha*, 462 U.S. at 959, the Framers introduced structural "safeguard[s] [for] individual liberty." *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (citing *Clinton*, 524 U.S. at 449-450 (Kennedy, J., concurring)). If the President may set immigration policy free of any meaningful limits imposed by Congress, then this Court becomes the primary protector of the liberties set out in the Bill of Rights.

The Government argues the opposite. It asserts that this Court's opinions in *Mandel* and *Din* prohibit courts from reviewing the constitutionality of an Executive policy whenever the Executive has offered some plausible national security rationale. Indeed,

the Government claims that this prohibition applies even where the President has publicly and repeatedly asserted that he is in fact pursuing an unconstitutional objective. Here are the stakes: The Government has admitted that—if its view carries the day—this Court would be powerless to intervene even if the President announced a desire to ban Jews and then barred all immigration from Israel the next day in the name of national security. Oral Argument at 1:55:20-1:58:00, *IRAP* v. *Trump*, No. 17-1351 (4th Cir. May 8, 2017) ("*IRAP* Oral Argument").

That is not the law. "[N]ational-security concerns" are not "a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 523 (1985)). *Mandel* and *Din* do not suggest otherwise.

First, this Court has never suggested that *Mandel* and *Din* supply the applicable framework for analyzing a constitutional challenge to a sweeping Executive policy. Both cases involved a very different scenario: a challenge to the Executive's decision to exclude a single alien pursuant to a specific statutory ground of inadmissibility. *See Din*, 135 S. Ct. at 2132; *Mandel*, 408 U.S. at 767. The Court explained that because the Executive was "implement[ing]" a "congressional mandate," *Mandel*, 408 U.S. at 767, it was entitled to insulation from review out of "due consideration of the congressional power to make rules for the exclusion of aliens," *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). Furthermore, because the Executive was fulfilling its traditional constitutional role of applying the laws on a case-by-case basis, this Court accorded it a measure of defer-

ence akin to prosecutorial discretion. *See Mandel*, 408 U.S. at 768-769 (explaining that it would be overly burdensome to weigh the Government's interest in excluding "the particular alien applicant" against "the strength of the audience's interest"); *cf. Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-491 (1999).

Those same rationales do not apply here. Unlike in *Mandel* and *Din*, the President cannot claim he was carrying out "specific statutory directions," *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); indeed, the Government claims he was acting under a virtually limitless delegation. And rather than fulfilling his core constitutional role by "execut[ing]" the law in individual cases, he is exercising the quintessentially "*congressional* power to make rules for the exclusion of aliens." *Id.* (emphasis added). When Congress exercises that power, it is subject to the structural safeguards afforded by bicameralism and presentment, which substantially ameliorate the threat to individual liberty posed by its "plenary power" over immigration. *See Chadha*, 462 U.S. at 957-958; *see also Salazar* v. *Buono*, 559 U.S. 700, 727 (2010) (Alito, J., concurring) ("our country's religious diversity is well represented" in Congress). But the President is subject to no such safeguards when he makes immigration policy, leaving judicial review as the only remaining check. If this Court afforded the President the massive deference he requests, that safeguard too would fall and the immigration power would be subject to the "final arbitrary action of one

person." *Chadha*, 462 U.S. at 951.[19] *Mandel* and *Din* plainly do not require that result.

Second, neither this Court nor any other has held that the *Mandel* and *Din* framework applies to an Establishment Clause challenge, where the salient question is whether a reasonable observer would view the Executive as acting with the primary purpose to exclude members of a particular faith. *Town of Greece*, 134 S. Ct. at 1825. *Mandel* and *Din* themselves involved no such allegation of an unconstitutional purpose. Rather, those cases concerned assertions that the Executive had offered an inadequate explanation for an exclusion that burdened a constitutional right. In *Mandel*, the challengers argued that the Executive's rationale for excluding a professor was too flimsy in light of the burden it placed on the First Amendment rights of those who wished to hear the professor speak. 408 U.S. at 760.[20] And in *Din*, the Court considered whether the Executive was required to provide a more robust explanation

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[19] *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678 (2017), is inapposite. In that case, the Court explained that it typically applies "minimal scrutiny (rational-basis review)" in reviewing constitutional challenges to immigration *statutes*, as a consequence of "*Congress*' 'exceptionally broad power' to admit or exclude aliens." *Id.* at 1693 (emphasis added) (quoting *Fiallo*, 430 U.S. at 792, 794). That deferential standard has no application here, where respondents are challenging a unilateral Executive policy. And far from "describ[ing]" *Mandel*, Br. 58, the *Morales-Santana* Court did not once mention it.

[20] Professor Mandel was excluded under a statute barring the admission of Communists, but as the case came before the Court, no one challenged the constitutionality of excluding aliens on that basis. 408 U.S. at 767.

for the exclusion of a U.S. citizen's husband, given the burden on her alleged due process right to his companionship. *Din*, 135 S. Ct. at 2131.

It was in these contexts that the *Mandel* majority and the *Din* concurrence declined to "look behind" the Executive's "facially neutral and bona fide" rationale: A "look behind" would have required second-guessing the adequacy of the Government's asserted rationale. *Mandel*, 408 U.S. at 770; *Din*, 135 S. Ct. at 2140-41. But respondents' constitutional challenge is not predicated on the assertion that the Government's asserted rationale for EO-3 is inadequate (although it undoubtedly is, *see supra* p. 43). Respondents' challenge is premised on the assertion that a reasonable observer would necessarily view the President as pursuing a different, unconstitutional purpose to exclude Muslims.

This Court has made crystal clear that in *that* form of First Amendment challenge, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993). And because neither *Mandel* nor *Din* involved a credible claim of an unconstitutional purpose, they do not displace that precedent.

Third, even if *Mandel* and *Din* did supply the applicable framework, they would not require deference in this case. Neither the *Mandel* majority nor the *Din* concurrence stated that courts must always defer in the face of a facially neutral rationale. Both recognized that deference is appropriate only when that rationale is also "bona fide." *Mandel*, 408 U.S. at 770; *Din*, 135 S. Ct. at 2140. As the *Din* concurrence explained, a court need not defer in the face of

"an affirmative showing of bad faith." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring). And as the Fourth Circuit held, respondents have made that showing because they have presented ample "undisputed evidence" that EO-3's "purpose is driven by anti-Muslim bias." *IRAP II*, 883 F.3d at 264.

The Government argues (at 61) that this evidence cannot qualify as an "affirmative showing of bad faith." It points to Justice Marshall's *Mandel* dissent, where he argued that the majority should have "look[ed] behind" the Government's asserted reason for the exclusion, because "the briefest peek" would have revealed it was a "sham." 408 U.S. at 777-778 (Marshall, J., dissenting). But Justice Marshall's sole basis for concluding that the Government's rationale was a "sham" was that there was "no basis in the present record" to support it. *Id.* at 778. Justice Marshall did not confront a situation where the decision-maker himself had publicly offered an altogether different rationale for his actions. Review here is not looking behind a policy; it is looking right at it.

The Government also argues that Justice Kennedy's reference to an "affirmative showing of bad faith" may be satisfied only by evidence that the consular officer lacked a "'factual basis' for excluding an alien." Br. 63 (quoting *Din*, 135 S. Ct. at 2140-41). That makes no sense. The point of *Din* was to limit scrutiny and disclosure of the "sensitive facts" underlying a consular officer's stated reasons for denying a visa to an alien abroad. 135 S. Ct. at 2141. According to the Government, however, *Din* requires a plaintiff to probe just those "sensitive facts" to make out a claim, embroiling courts in the

precise inquiry that *Din* was meant to minimize. That cannot be right. It is far more plausible to assume that the *Din* concurrence had in mind the sort of evidence available here: public statements "affirmative[ly]" indicating the "bad faith" of the decisionmaker.

B. An Objective Observer Would Conclude That EO-3 Was Enacted For The Unconstitutional Purpose Of Excluding Muslims.

The Establishment Clause bars Government policies "respecting an establishment of religion." U.S. Const. amend. I. That prohibition forecloses practices—like faith-based immigration restrictions—that were used before the Founding to establish state religions. *Town of Greece*, 134 S. Ct. at 1819 (recognizing importance of history in interpreting Establishment Clause); *see McConnell*, *supra*, at 2116-2117 (discussing colonial-era attempts to exclude Catholics in order to establish state religions). More broadly, it bars any Government action taken for the "primary purpose" of disfavoring a particular religion. *Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987); *Lukumi*, 508 U.S. at 532 (the Establishment Clause "forbids an official purpose to disapprove of a particular religion"); *cf. United States* v. *Windsor*, 570 U.S. 744, 770 (2013) (finding a constitutional violation where discrimination was "more than an incidental effect of the federal statute"; "[i]t was its essence").

A policy designed to exclude Muslims plainly runs afoul of the Establishment Clause—and the Government does not say otherwise. *See IRAP* Oral

Argument at 29:35-30:00 (acknowledging that a Muslim ban would be unconstitutional). The only question, then, is whether the evidence demonstrates that a "reasonable observer" would view EO-3 as enacted for that unconstitutional purpose. *Town of Greece*, 134 S. Ct. at 1825. As the Fourth Circuit concluded, the answer is plainly yes. *IRAP II*, 883 F.3d at 269.

1. a. In assessing how a reasonable observer would understand the purpose of a Government action, "an equal protection mode of analysis" applies. *Lukumi*, 508 U.S. at 540. Aside from the text and operation of the policy, a court must also examine the readily discoverable evidence regarding "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by" the decision-maker. *Id.*; *see McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (courts must look to "text, legislative history, and implementation" (quoting *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000))).

This publicly available evidence is particularly important in the Establishment Clause context because that Clause was intended to prevent the Government from "coerc[ing] [the Nation's] citizens" in matters of faith. *Town of Greece*, 134 S. Ct. at 1824-26. Forbidden coercion inevitably occurs when the events surrounding the enactment of a particular policy make clear that it was intended to disfavor or exclude members of a particular religion. *See Lukumi*, 508 U.S. 540-541; *McCreary*, 545 U.S. at 863 (Establishment Clause prohibits "divisive an-

nouncement[s]" that "amount[] to taking religious sides"). A citizen cannot feel free to practice his faith in public, and to raise his children to do the same, when he is made to understand that his government is making policies targeting members of that very faith. *See, e.g.*, J.A. 318-323 (Decl. of Dr. Elshikh); Decl. of Amicus Curiae Khizr Khan ¶¶ 25-29, C.A. Dkt. 88.

b. The history and circumstances surrounding the enactment of EO-3 would convince any reasonable observer that it is a policy intended to exclude Muslims. In a series of events that is by now chillingly familiar, the President repeatedly announced on the campaign trail that he intended to enact a "Muslim ban"; he even issued a formal "Statement on Preventing Muslim Immigration." When it was suggested that his plan would violate the Constitution, he began "talking territory instead of Muslim." J.A. 123. But he publicly clarified this was not a rollback, but—if anything—"an expansion" of the promised ban. *Id.*

One week after his inauguration, the President did exactly what he promised. He issued an order that overwhelmingly excluded Muslims while speaking in terms of "territory instead of [religion]." At the signing, he looked up at the camera after reading the title and announced: "We all know what that means." J.A. 124. That night, he publicly confirmed that EO-1's refugee provisions were designed to help Christians at the expense of Muslims. And that weekend, one of his chief surrogates gave a television interview explaining that EO-1 started out as the President's Muslim ban.

Even after EO-1 was enjoined by the courts, the President did not announce any retreat from his unconstitutional purpose. To the contrary, his advisors assured the Nation that the President's replacement order would fulfill the "same basic policy." J.A. 127. And once EO-2 was released, the President made clear that it did just that, publicly describing EO-2 as a "watered down Travel Ban," and suggesting that his only regret was not enacting a much "tougher version." J.A. 132-133.

Last June, the President repeated these statements in a series of tweets calling for a "much tougher version" of his "Travel Ban." Nine days before the release of EO-3, he again stated that the "travel ban * * * should be far larger, tougher and more specific," adding "stupidly[] that would not be politically correct." J.A. 133. And on the day EO-3 became public, the President made clear that it *was* the harsher version of the travel ban, telling reporters, "The travel ban: The tougher, the better." J.A. 136.

Later, the President and his Administration explicitly linked EO-3 to anti-Muslim sentiments. On November 29, 2017, the President retweeted three anti-Muslim propaganda videos, whose disturbing titles reflect their inflammatory content: "Muslim migrant beats up Dutch boy on crutches!" "Islamist mob pushes teenage boy off roof and beats him to death!" and "Muslim Destroys a Statue of Virgin Mary!" *IRAP II*, 883 F.3d at 267. In response to questioning from reporters, the President's deputy press secretary explained that the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "the President has addressed these issues with

the travel order that he issued earlier this year and the companion proclamation." *Id.*

c. The text and operation of EO-3 confirm that a reasonable observer would view EO-3 as enacted for an unconstitutional purpose.

EO-3, like its predecessors, targets almost exclusively Muslim-majority nations. All seven countries banned by EO-1, all six countries banned by EO-2, and all six countries practically affected by EO-3 are majority—and, generally, overwhelmingly—Muslim. EO-3 nominally includes two non-Muslim majority countries, North Korea and Venezuela, but the addition of these countries is almost purely symbolic. A prior sanctions order already restricts the entry of North Korea's nationals (who virtually never apply for admission in any event), Exec. Order No. 13,810, § 1(a)(iv), and EO-3 targets only a small handful of Venezuelan government officials, Pet. App. 134a-135a. Given these minimal effects, one might be forgiven for assuming that these countries were added in an effort to improve the Government's "litigating position," rather than to achieve any legitimate substantive goal. *McCreary*, 545 U.S. at 871.

Moreover, the exceedingly poor fit between EO-3's design and its stated goals raises a strong inference that it is a "religious gerrymander." *Lukumi*, 508 U.S. at 535; *see also Romer* v. *Evans*, 517 U.S. 620, 635 (1996) ("breadth" of "status-based enactment" was "so far removed from [the State's] particular justifications that [it was] impossible to credit them"). The Government asserts that EO-3 is designed to improve security by excluding nationals of

countries that do not provide "sufficient information to assess the risks" that their nationals pose. Pet. App. 128a-129a. But EO-3 denies immigrant visas to *all* nationals of those countries, even those—like toddlers and long-time residents of different countries—whose admission plainly does not implicate these information deficiencies. Moreover, the order permits many of these nationals to obtain non-immigrant visas, suggesting that the government is capable of safely vetting these aliens when it wants to. *See supra* p. 43. EO-3 is thus a poor fit for the Government's stated national security goal, but a very good fit for the goal of "preventing Muslim immigration." J.A. 158.

2. The Government offers no credible response to this wealth of evidence. It makes virtually no attempt to defend the voluminous record of statements announcing the President's aim of excluding Muslims from the United States, and reaffirming the link between that stated policy and the travel ban embodied in EO-3.

The Government protests (at 65) that the "text" of the order "says nothing about religion" and that in "operation" the order does not apply *exclusively* to Muslims (just overwhelmingly so). But "facial neutrality" is not enough to satisfy the Establishment Clause. The Constitution "forbids subtle departures from neutrality * * * and covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534 (internal quotation marks omitted). Accordingly, this Court has made clear that government officials cannot evade Establishment Clause scrutiny by masking their illicit motives in purportedly neutral language, or passing generally applicable laws

gerrymandered to target a particular religion. *See id.* That admonition is particularly relevant here, where the President and his subordinates announced their intention to start "talking territory instead of Muslim" precisely in order to escape criticism for the announced Muslim ban. J.A. 123.

The Government also asserts that no reasonable observer would view the ban as religiously motivated because it was the product of a review overseen by cabinet officials whose motivations are not themselves in doubt. But the involvement of cabinet officials at some stage of the process would hardly cause an objective observer to overlook the explicit connection the President and his spokesmen have drawn between the proclamation and the President's anti-Muslim statements. *See, e.g.*, *IRAP II*, 883 F.3d at 268 (observing that the "President's own deputy press secretary" linked EO-3 to the "President Trump's tweet[ing of] extremist anti-Muslim videos").

Moreover, while the Government deems the review process "neutral," it was dictated by EO-2, an order that was judged unconstitutional by multiple courts. And before the review process was even underway, the President was already calling for a "much tougher" ban, J.A. 133, suggesting the result of the process was foreordained. That suggestion is reinforced by the marked disparity between the "neutral criteria" that allegedly guided the review and the list of countries that EO-3 actually targets. For example, Somalia meets the neutral criteria, yet nonetheless appears on the list of banned countries; meanwhile, Iraq does not meet the criteria, but is excused from the ban.

The Government also contends (at 67, 71) that the Court may not look at any evidence of the purpose of EO-3 beyond its text and operation. It worries that examining anything beyond the face of the order will lead to "judicial psychoanalysis" and burdensome discovery that will impede the Executive Branch. Br. 67, 70-72. This Court's precedents foreclose the limitations the Government advocates. *See Lukumi*, 508 U.S. at 540; *McCreary*, 545 U.S. at 862. Furthermore, the Government's concerns are mitigated by the nature of the inquiry itself. A reasonable observer does not, for example, psychoanalyze a drafter or look at his college term papers, nor does she have access to privileged Executive Branch discussions. Evidence of that kind is similarly out of bounds for courts.

Retreating, the Government suggests—with only a dissent for support—that at least campaign statements should be off limits. But the Administration itself has repeatedly acknowledged that EO-3 and its precursors are a direct outgrowth of the President's campaign statements: As recently as November, the President's spokesperson reminded the public that EO-3 addresses "issues" the President has been talking about "for years" including on "the campaign trail." *IRAP II*, 883 F.3d at 267; *see also supra* pp. 7-9 (cataloguing instances when the Administration has tied the President's actions to his "campaign promises"). In this circumstance, it would make little sense for a court to ignore such probative evidence. *See Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008) (whether evidence is relevant to discriminatory intent "is fact based and depends on many factors").

In any event, there is a wealth of *post*-inauguration evidence demonstrating that EO-3's purpose is the exclusion of Muslims. *See supra* pp. 7-10. The Government seeks to defeat that evidence by offering neutral readings of *some* of the President's remarks. But the Government does not even tackle much of the worst of the evidence. It does not, for example, explain what neutral message a reasonable observer could draw from the President's promotion of anti-Muslim videos and his spokesperson's explicit linkage of those videos to the "issues" the President has "addressed" with the "travel order that he issued earlier this year." *IRAP II*, 883 F.3d at 267. Instead, the Government relies on a "presumption of regularity." Br. 68. But even if that presumption applied to this irregular order (which it does not), it is easily defeated by the "clear evidence" in this case. *United States* v. *Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926).

For all of these reasons, observers from across the religious and political spectrum have concluded that EO-3 amounts to impermissible religious discrimination. *See, e.g.*, Amicus Br. CATO Institute 5-8, C.A. Dkt. 84; Amicus Br. Members of Cong. 17-29, C.A. Dkt. 76; Amicus Br. Interfaith Orgs. 7-18, C.A. Dkt. 73.

3. Finally, the Government suggests that respondents have mistaken the President's sincere concerns regarding the threat of terrorism for animus against Islam. *See, e.g.*, Br. 68. But it is the President who has repeatedly conflated a violent fringe element of Islam with Islam as a whole. *See, e.g.*, J.A. 121. That conflation is at the heart of the Establishment Clause violation in this case.

Our Framers were well aware that religious persecution is often born not of explicit animus, but of the perceived national security threat posed by a minority religion. At the time of the Founding, England was rife with violent religious plots—both real and imagined. *See, e.g.*, Alan Haynes, *The Gunpowder Plot* (2011). As a consequence, Catholics, Puritans, and other dissenters faced harsh treatment from their government, which viewed non-conformist religious beliefs as a threat to the state. *Id.* at 98-108. Many of those who chafed under this persecution became the United States' first colonists, eager to avoid the excesses of the oppressive government they were fleeing. McConnell, *supra*, at 2112-14.

The Religion Clauses therefore speak in absolute terms that foreclose *any* policy that "classifl[ies] citizens based on their religious views," no matter the rationale. *Town of Greece*, 134 S. Ct. at 1826. A President may no more set aside that constitutional bar because he believes it is necessary for national security than he may set aside the right to bear arms because he believes gun ownership is a threat to our public safety. In wartime and peace, the Government may not take actions that amount to "disguised religious persecution." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 644 (1943) (Black, J., concurring).

V. THE SCOPE OF THE INJUNCTION IS PROPER.

The proper remedy for the President's violations of the immigration laws and the Constitution is a nationwide injunction. As the lower courts found, that remedy prevents the violations in full, redresses

respondents' injuries, and maintains the "uniform" system of immigration that Congress and the Constitution demand. The Government's arguments in favor of a narrower injunction are unavailing.

1. When an Executive Branch policy contravenes a statute, it is invalid and should be struck down on its face. *See, e.g.*, *UARG*, 134 S. Ct. at 2449; *Sullivan* v. *Zebley*, 493 U.S. 521, 536 n.18 (1990). The same is true for a violation of the Establishment Clause: When a government policy is motivated by an impermissible purpose, *all* applications of that policy are tainted and therefore unlawful. *See Santa Fe*, 530 U.S. at 314-317. Accordingly, where—as here—plaintiffs with standing launch a successful facial challenge, the policy should be enjoined in full. *See id.*

The need for facial relief in this case is particularly acute for two reasons. *First*, a narrower injunction will not fully redress respondents' injuries. Even the Government acknowledges that an injunction must provide "complete relief to the plaintiffs." Br. at 72 (quoting *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). Here, enjoining the exclusion of particular immigrants will not remedy the State's or the Association's injuries. Those entities cannot identify in advance precisely which foreign nationals may wish to join or visit their institutions, and targeted relief cannot eliminate the profound deterrent effect that EO-3 has on prospective candidates from affected countries. Moreover, narrower relief cannot remove the stigmatic harm that respondents suffer based on "the simple enactment" of the Government's policy. *Santa Fe*, 530 U.S. at 316.

Second, a nationwide injunction is necessary because the Constitution and the INA require that our immigration system be "uniform." U.S. Const. art. I, § 8, cl. 4; Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 115(1) ("the immigration laws of the United States should be enforced vigorously and *uniformly*" (emphasis added)). A targeted injunction would create a fragmented immigration system in violation of these constitutional and congressional mandates.

2. The Government's arguments in favor of such targeted relief all fail. It claims (at 72) that Article III requires the Ninth Circuit's injunction to be narrowed. But the cases cited by the Government hold only that courts must limit injunctive relief to the policy or provision "that produced the injury in fact that the plaintiff has established." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 353 (2006) (internal quotation marks omitted); *see Madsen*, 512 U.S. at 765 (considering whether "the challenged provisions" should be enjoined); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101, 106 (1983) (considering plaintiff's standing to enjoin "the City's policy"). That is precisely what the lower court did here: It enjoined only those provisions of EO-3 that harm respondents.

The Government also contends that "[e]quitable principles" prohibit injunctions that "go beyond redressing any harm to named plaintiffs." Br. 72-73. If accepted, the Government's rule would upend the longstanding equitable practice of enjoining all applications of a facially unlawful policy. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of the

violation established, not by the geographical extent of the plaintiff class"). Moreover, the Government's view ignores the deep roots of equitable remedies that extend beyond the parties: The English Court of Chancery regularly entertained "bill[s] of peace," a procedure that permitted equitable relief to be extended to "those absent from the action." 7A Charles Alan Wright et al., Federal Practice & Procedure § 1751 (3d. ed. 2017 update).[21]

The Government's attempt to rely on the severability clause in EO-3 is equally unsuccessful. The Government may not "immunize" its enactments "from facial review" by inserting a severability clause expressing a "preference for a narrow judicial remedy." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2319 (2016). In any event, the clause states that EO-3's provisions should be enjoined only to the extent that "the application of any provision to any person or circumstance[] is held to be invalid." Pet. App. 147a (§ 8(a)). The Ninth Circuit followed that provision exactly: It concluded that *any* application of certain provisions of EO-3 would exceed the President's authority, and it enjoined only those provisions.

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[21] The Government incorrectly suggests that this wider relief is available exclusively in class actions. But as Judge Friendly has explained, in suits seeking a "prohibitory" injunction against the Government, the "class action designation is largely a formality," because either way the "judgment run[s] to the benefit not only of the named plaintiffs but of all others similarly situated." *Galvan* v. *Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973).

Finally, the Government claims that nationwide relief will "bring[] judicial review in all other fora to a halt." Br. 75. But this Court has already refused to "adopt the extreme position" that nationwide relief should be barred because it might "foreclos[e] adjudication" elsewhere. *Yamasaki*, 442 U.S. at 702. In any event, nationwide relief plainly does not stifle percolation: The Fourth and Ninth Circuits both simultaneously reviewed EO-3 even though nationwide injunctions had already been entered in both cases.

In the end, it is the Government's position that "disserves the orderly, evenhanded development of the law." Br. 75. In fashioning equitable relief, courts must take into account "what is workable." *North Carolina* v. *Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam). Here, a narrower injunction would lead to dozens if not hundreds of additional suits seeking relief for the countless similarly situated parties throughout the United States. And it would sow chaos and uncertainty for U.S. citizens, foreign nationals, and federal officials, as was true of the narrower injunctions issued by some courts in response to EO-1. *See* Office of Inspector Gen., U.S. Dep't of Homeland Sec., DHS Implementation of Executive Order #13769 (Jan. 18, 2018), http://goo.gl/4rR2YZ (noting "confusion as to the scope of some [court] orders").

CONCLUSION

For these reasons, the judgment should be affirmed.

Respectfully submitted,

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MARCH 2018

ADDENDUM

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ADDENDUM

CONSTITUTIONAL PROVISIONS INVOLVED

1. **Article I, Section 8 of the Constitution provides in pertinent part**:

The Congress shall have Power

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * * * *

2. **The First Amendment provides:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTORY PROVISIONS INVOLVED

1. **8 U.S.C. § 1152(a)(1) provides:**

Numerical limitations on individual foreign states

(a) *Per country level*

(1) *Nondiscrimination*

(A) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

* * * * *

2. **8 U.S.C. § 1182 provides in pertinent part:**

Inadmissible aliens

(a) *Classes of aliens ineligible for visas or admission*

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) *Health-related grounds*

(A) *In general*

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the

alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) *Waiver authorized*

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) *Exception from immunization requirement for adopted children 10 years of age or younger*

Clause (ii) of subparagraph (A) shall not apply to a child who—

(i) is 10 years of age or younger,

(ii) is described in subparagraph (F) or (G) of section 1101(b)(1) of this title; and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) *Criminal and related grounds*

(A) *Conviction of certain crimes*

(i) *In general*

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) *Exception*

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the

alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) *Multiple criminal convictions*

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) *Controlled substance traffickers*

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) *Prostitution and commercialized vice*

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) *Certain aliens involved in serious criminal activity who have asserted immunity from prosecution*

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) *Waiver authorized*

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) *Foreign government officials who have committed particularly severe violations of religious freedom*

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of Title 22, is inadmissible.

(H) *Significant traffickers in persons*

(i) *In general*

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

(ii) *Beneficiaries of trafficking*

Except as provided in clause (iii), any alien who the consular officer or the Attorney

General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) *Exception for certain sons and daughters*

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) *Money laundering*

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) *Security and related grounds*

(A) *In general*

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to

believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) *Terrorist activities*

(i) *In general*

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) *Exception*

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) *"Terrorist activity" defined*

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) *"Engage in terrorist activity" defined*

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) *"Representative" defined*

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) *"Terrorist organization" defined*

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(4) *Public charge*

(A) *In general*

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) *Factors to be taken into account*

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(C) *Family-sponsored immigrants*

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless—

(i) the alien has obtained—

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required

under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(D) *Certain employment-based immigrants*

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

(E) *Special rule for qualified alien victims*

Subparagraphs (A), (B), and (C) shall not apply to an alien who—

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

(5) *Labor certification and qualifications for certain immigrants*

(A) *Labor certification*

(i) *In general*

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified

to the Secretary of State and the Attorney General that—

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) *Certain aliens subject to special rule*

For purposes of clause (i)(I), an alien described in this clause is an alien who—

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) *Professional athletes*

(I) *In general*

A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) *"Professional athlete" defined*

For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by—

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) *Long delayed adjustment applicants*

A certification made under clause (i) with respect to an individual whose petition is covered by section 1154(j) of this title shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) *Unqualified physicians*

An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical

school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) *Uncertified foreign health-care workers*

Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that—

(i) the alien's education, training, license, and experience—

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in

consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) *Application of grounds*

The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 1153(b) of this title.

(6) *Illegal entrants and immigration violators*

(A) *Aliens present without admission or parole*

(i) *In general*

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) *Exception for certain battered women and children*

Clause (i) shall not apply to an alien who demonstrates that—

(I) the alien is a VAWA self-petitioner;

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) *Failure to attend removal proceeding*

Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) *Misrepresentation*

(i) *In general*

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

(ii) *Falsely claiming citizenship*

(I) *In general*

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

(II) *Exception*

In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) *Waiver authorized*

For provision authorizing waiver of clause (i), see subsection (i).

(D) *Stowaways*

Any alien who is a stowaway is inadmissible.

(E) *Smugglers*

(i) *In general*

Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) *Special rule in the case of family reunification*

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) *Waiver authorized*

For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) *Subject of civil penalty*

(i) *In general*

An alien who is the subject of a final order for violation of section 1324c of this title is inadmissible.

(ii) *Waiver authorized*

For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) *Student visa abusers*

An alien who obtains the status of a nonimmigrant under section 1101(a)(15)(F)(i) of this title and who violates a term or condition of such status under section 1184(l) of this title is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

(7) *Documentation requirements*

(A) *Immigrants*

(i) *In general*

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) *Waiver authorized*

For provision authorizing waiver of clause (i), see subsection (k).

(B) *Nonimmigrants*

(i) *In general*

Any nonimmigrant who—

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) *General waiver authorized*

For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) *Guam and Northern Mariana Islands visa waiver*

For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (l).

(iv) *Visa waiver program*

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

(8) *Ineligible for citizenship*

(A) *In general*

Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) *Draft evaders*

Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) *Aliens previously removed*

(A) *Certain aliens previously removed*

(i) *Arriving aliens*

Any alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) *Other aliens*

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) *Exception*

Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) *Aliens unlawfully present*

(i) *In general*

Any alien (other than an alien lawfully admitted for permanent residence) who—

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 1254a(e)[2] of this title) prior to the commencement of proceedings under section 1225(b)(1) of this title or section 1229a of this title, and again seeks admission within 3

years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) *Construction of unlawful presence*

For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) *Exceptions*

(I) *Minors*

No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) *Asylees*

No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) *Family unity*

No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) *Battered women and children*

Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) *Victims of a severe form of trafficking in persons*

Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 7102 of Title 22) was at least one central reason for the alien's unlawful presence in the United States.

(iv) *Tolling for good cause*

In the case of an alien who—

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) *Waiver*

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) *Aliens unlawfully present after previous immigration violations*

(i) *In general*

Any alien who—

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) *Exception*

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United

States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) *Waiver*

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

(10) *Miscellaneous*

(A) *Practicing polygamists*

Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) *Guardian required to accompany helpless alien*

Any alien—

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 1222(c) of this title, and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i),

is inadmissible.

(C) *International child abduction*

(i) *In general*

Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

(ii) *Aliens supporting abductors and relatives of abductors*

Any alien who—

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to

return to the United States or such person's place of residence.

(iii) *Exceptions*

Clauses (i) and (ii) shall not apply—

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) *Unlawful voters*

(i) *In general*

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) *Exception*

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age

of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) *Former citizens who renounced citizenship to avoid taxation*

Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

* * * * *

(f) *Suspension of entry or imposition of restrictions by President*

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

* * * * *

3. **8 U.S.C. § 1185 provides:**

Travel control of citizens and aliens

(a) *Restrictions and prohibitions*

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

(b) *Citizens*

Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.

(c) *Definitions*

The term "United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic.

(d) *Nonadmission of certain aliens*

Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

(e) *Revocation of proclamation as affecting penalties*

The revocation of any rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under this section prior to the revocation of such rule, regulation, or order.

(f) *Permits to enter*

Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

4. **8 U.S.C. § 1187 provides in pertinent part:**

Visa waiver program for certain visitors

(a) *Establishment of program*

The Secretary of Homeland Security and the Secretary of State are authorized to establish a program (hereinafter in this section referred to as the "program") under which the requirement of paragraph (7)(B)(i)(II) of section 1182(a) of this title may be waived by the Secretary of Homeland Security, in consultation with the Secretary of State and in accordance with this section, in the case of an alien who meets the following requirements:

(1) *Seeking entry as tourist for 90 days or less*

The alien is applying for admission during the program as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) for a period not exceeding 90 days.

(2) *National of program country*

The alien is a national of, and presents a passport issued by, a country which—

(A) extends (or agrees to extend), either on its own or in conjunction with one or more other countries that are described in subparagraph (B) and that have established with it a common area for immigration admissions, reciprocal privileges to citizens and nationals of the United States, and

(B) is designated as a pilot program country under subsection (c).

(3) *Passport requirements*

The alien, at the time of application for admission, is in possession of a valid unexpired passport that satisfies the following:

(A) *Machine readable*

The passport is a machine-readable passport that is tamper-resistant, incorporates document authentication identifiers, and otherwise satisfies the internationally accepted standard for machine readability.

(B) *Electronic*

Beginning on April 1, 2016, the passport is an electronic passport that is fraud-resistant, contains relevant biographic and biometric information (as determined by the Secretary of Homeland Security), and otherwise satisfies internationally accepted standards for electronic passports.

(4) *Executes immigration forms*

The alien before the time of such admission completes such immigration form as the Secretary of Homeland Security shall establish.

(5) *Entry into the United States*

If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier, including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations which has entered into an agreement with the Secretary of Homeland Security pursuant to subsection (e). The Secretary of Homeland Security is authorized to require a carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a domestic corporation conducting operations under part 91 of that title, to give suitable and proper bond, in such reasonable amount and containing such conditions as the Secretary of Homeland Security may deem sufficient to ensure compliance with the indemnification requirements of this section, as a term of such an agreement.

(6) *Not a safety threat*

The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(7) *No previous violation*

If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(8) *Round-trip ticket*

The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Secretary of Homeland Security under regulations or the alien is arriving at the

port of entry on an aircraft operated under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations).

(9) *Automated system check*

The identity of the alien has been checked using an automated electronic database containing information about the inadmissibility of aliens to uncover any grounds on which the alien may be inadmissible to the United States, and no such ground has been found.

(10) *Electronic transmission of identification information*

Operators of aircraft under part 135 of title 14, Code of Federal Regulations, or operators of noncommercial aircraft that are owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, carrying any alien passenger who will apply for admission under this section shall furnish such information as the Secretary of Homeland Security by regulation shall prescribe as necessary for the identification of any alien passenger being transported and for the enforcement of the immigration laws. Such information shall be electronically transmitted not less than one hour prior to arrival at the port of entry for purposes of checking for inadmissibility using the automated electronic database.

(11) *Eligibility determination under the electronic system for travel authorization*

Beginning on the date on which the electronic system for travel authorization developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States. Upon review of such biographical information, the Secretary of Homeland Security shall determine whether the alien is eligible to travel to the United States under the program.

(12) *Not present in Iraq, Syria, or any other country or area of concern*

(A) *In general*

Except as provided in subparagraphs (B) and (C)—

(i) the alien has not been present, at any time on or after March 1, 2011—

(I) in Iraq or Syria;

(II) in a country that is designated by the Secretary of State under section 4605(j) of Title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of Title 22, section 2371 of Title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) in any other country or area of concern designated by the Secretary of Homeland Security under subparagraph (D); and

(ii) regardless of whether the alien is a national of a program country, the alien is not a national of—

(I) Iraq or Syria;

(II) a country that is designated, at the time the alien applies for admission, by the Secretary of State under section 4605(j) of Title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of Title 22, section 2371 of Title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) any other country that is designated, at the time the alien applies for admission, by the Secretary of Homeland Security under subparagraph (D).

(B) *Certain military personnel and government employees*

Subparagraph (A)(i) shall not apply in the case of an alien if the Secretary of Homeland Security determines that the alien was present—

(i) in order to perform military service in the armed forces of a program country; or

(ii) in order to carry out official duties as a full time employee of the government of a program country.

(C) *Waiver*

The Secretary of Homeland Security may waive the application of subparagraph (A) to an alien if the Secretary determines that such a waiver is in the law enforcement or national security interests of the United States.

(D) *Countries or areas of concern*

(i) *In general*

Not later than 60 days after December 18, 2015, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall determine whether the requirement under subparagraph (A) shall apply to any other country or area.

(ii) *Criteria*

In making a determination under clause (i), the Secretary shall consider—

(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States;

(II) whether a foreign terrorist organization has a significant presence in the country or area; and

(III) whether the country or area is a safe haven for terrorists.

(iii) *Annual review*

The Secretary shall conduct a review, on an annual basis, of any determination made under clause (i).

(E) *Report*

Beginning not later than one year after December 18, 2015, and annually thereafter, the Secretary of Homeland Security shall submit to the Committee on Homeland Security, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, the Select Committee on Intelligence, and the Committee on the Judiciary of the Senate a report on each instance in which the Secretary exercised the waiver authority under subparagraph (C) during the previous year.

* * * * *

(c) *Designation of program countries*

(1) *In general*

The Secretary of Homeland Security, in consultation with the Secretary of State, may designate any country as a program country if it meets the requirements of paragraph (2).

(2) *Qualifications*

Except as provided in subsection (f), a country may not be designated as a program country unless the following requirements are met:

(A) *Low nonimmigrant visa refusal rate*

Either—

(i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during—

(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and

(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or

(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.

(B) *Passport program*

(i) *Issuance of passports*

The government of the country certifies that it issues to its citizens passports described in subparagraph (A) of subsection (a)(3), and on or after April 1, 2016, passports described in subparagraph (B) of subsection (a)(3).

(ii) *Validation of passports*

Not later than October 1, 2016, the government of the country certifies that it has in place mechanisms to validate passports described in subparagraphs (A) and (B) of subsection (a)(3) at each key port of entry into that country. This requirement shall not apply to travel between countries which fall within the Schengen Zone.

(C) *Law enforcement and security interests*

The Secretary of Homeland Security, in consultation with the Secretary of State—

(i) evaluates the effect that the country's designation would have on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(ii) determines that such interests would not be compromised by the designation of the country; and

(iii) submits a written report to the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Homeland Security of the House of Representatives and the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs of the Senate regarding the country's qualification for designation that includes an explanation of such determination.

(D) *Reporting lost and stolen passports*

The government of the country enters into an agreement with the United States to report, or make available through Interpol or other means as designated by the Secretary of Homeland Security, to the United States Government information about the theft or loss of passports not later than 24 hours after becoming aware of the theft or loss and in a manner specified in the agreement.

(E) *Repatriation of aliens*

The government of the country accepts for repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued not later than three weeks after the issuance of the final order of removal. Nothing in this subparagraph creates any duty for the United States or any right for any alien with respect to removal or release. Nothing in this subparagraph gives rise to any cause of action or claim under this paragraph or any other law against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(F) *Passenger information exchange*

The government of the country enters into an agreement with the United States to share information regarding whether citizens and nationals of that country traveling to the United States represent a threat to the security or welfare of the United States or its citizens, and fully implements such agreement.

(G) *Interpol screening*

Not later than 270 days after December 18, 2015, except in the case of a country in which there is not an international airport, the government of the country certifies to the Secretary of Homeland Security that, to the maximum extent allowed under the laws of the country, it is screening, for unlawful activity, each person who is not a citizen or national of that country who is admitted to or departs that country, by using relevant databases and notices maintained by Interpol, or other means

designated by the Secretary of Homeland Security. This requirement shall not apply to travel between countries which lie within the Schengen Zone.

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5. **8 U.S.C. § 1201(g) provides:**

Issuance of visas

* * * * *

(g) *Nonissuance of visas or other documents*

No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law: *Provided*, That a visa or other documentation may be issued to an alien who is within the purview of section 1182(a)(4) of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: *Provided further*, That a visa may be issued to an alien defined in section 1101(a)(15)(B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the

giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

* * * * *

6. **8 U.S.C. § 1202 provides:**

Application for visas

(a) *Immigrant visas*

Every alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed. In the application the alien shall state his full and true name, and any other name which he has used or by which he has been known; age and sex; the date and place of his birth; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

(b) *Other documentary evidence for immigrant visa*

Every alien applying for an immigrant visa shall present a valid unexpired passport or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Secretary of State. The immigrant shall furnish to the consular officer with his application a copy of a certification by the

appropriate police authorities stating what their records show concerning the immigrant; a certified copy of any existing prison record, military record, and record of his birth; and a certified copy of all other records or documents concerning him or his case which may be required by the consular officer. The copy of each document so furnished shall be permanently attached to the application and become a part thereof. In the event that the immigrant establishes to the satisfaction of the consular officer that any document or record required by this subsection is unobtainable, the consular officer may permit the immigrant to submit in lieu of such document or record other satisfactory evidence of the fact to which such document or record would, if obtainable, pertain. All immigrant visa applications shall be reviewed and adjudicated by a consular officer.

(c) *Nonimmigrant visas; nonimmigrant registration; form, manner and contents of application*

Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, the date and place of birth, his nationality, the purpose and length of his intended stay in the United States; his marital status; and such additional information necessary to the identification of the applicant, the determination of his eligibility for a nonimmigrant visa, and the enforcement of the immigration and nationality laws as may be by regulations prescribed. The alien shall provide complete and accurate information in response to any request for information contained in

the application. At the discretion of the Secretary of State, application forms for the various classes of nonimmigrant admissions described in section 1101(a)(15) of this title may vary according to the class of visa being requested.

(d) *Other documentary evidence for nonimmigrant visa*

Every alien applying for a nonimmigrant visa and alien registration shall furnish to the consular officer, with his application, a certified copy of such documents pertaining to him as may be by regulations required. All nonimmigrant visa applications shall be reviewed and adjudicated by a consular officer.

(e) *Signing and verification of application*

Except as may be otherwise prescribed by regulations, each application for an immigrant visa shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer. The application for an immigrant visa, when visaed by the consular officer, shall become the immigrant visa. The application for a nonimmigrant visa or other documentation as a nonimmigrant shall be disposed of as may be by regulations prescribed. The issuance of a nonimmigrant visa shall, except as may be otherwise by regulations prescribed, be evidenced by a stamp, or other placed in the alien's passport.

(f) *Confidential nature of records*

The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the

formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that—

(1) in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.

(2) the Secretary of State, in the Secretary's discretion and on the basis of reciprocity, may provide to a foreign government information in the Department of State's computerized visa lookout database and, when necessary and appropriate, other records covered by this section related to information in the database—

(A) with regard to individual aliens, at any time on a case-by-case basis for the purpose of preventing, investigating, or punishing acts that would constitute a crime in the United States, including, but not limited to, terrorism or trafficking in controlled substances, persons, or illicit weapons; or

(B) with regard to any or all aliens in the database, pursuant to such conditions as the Secretary of State shall establish in an agreement with the foreign government in which that government agrees to use such information and records for the purposes described in subparagraph (A) or to deny visas to persons who would be inadmissible to the United States.

(g) *Nonimmigrant visa void at conclusion of authorized period of stay*

(1) In the case of an alien who has been admitted on the basis of a nonimmigrant visa and remained in the United States beyond the period of stay authorized by the Attorney General, such visa shall be void beginning after the conclusion of such period of stay.

(2) An alien described in paragraph (1) shall be ineligible to be readmitted to the United States as a nonimmigrant, except—

(A) on the basis of a visa (other than the visa described in paragraph (1)) issued in a consular office located in the country of the alien's nationality (or, if there is no office in such country, in such other consular office as the Secretary of State shall specify); or

(B) where extraordinary circumstances are found by the Secretary of State to exist.

(h) *In person interview with consular officer*

Notwithstanding any other provision of this chapter, the Secretary of State shall require every alien applying for a nonimmigrant visa—

(1) who is at least 14 years of age and not more than 79 years of age to submit to an in person interview with a consular officer unless the requirement for such interview is waived—

(A) by a consular official and such alien is—

(i) within that class of nonimmigrants enumerated in subparagraph (A) or (G) of section 1101(a)(15) of this title;

(ii) within the NATO visa category;

(iii) within that class of nonimmigrants enumerated in section 1101(a)(15)(C)(iii)[3] of this title (referred to as the "C-3 visa" category); or

(iv) granted a diplomatic or official visa on a diplomatic or official passport or on the equivalent thereof;

(B) by a consular official and such alien is applying for a visa—

(i) not more than 12 months after the date on which such alien's prior visa expired;

(ii) for the visa classification for which such prior visa was issued;

(iii) from the consular post located in the country of such alien's usual residence, unless otherwise prescribed in regulations that require an applicant to apply for a visa in the country of which such applicant is a national; and

(iv) the consular officer has no indication that such alien has not complied with the immigration laws and regulations of the United States; or

(C) by the Secretary of State if the Secretary determines that such waiver is—

(i) in the national interest of the United States; or

(ii) necessary as a result of unusual or emergent circumstances; and

(2) notwithstanding paragraph (1), to submit to an in person interview with a consular officer if such alien—

(A) is not a national or resident of the country in which such alien is applying for a visa;

(B) was previously refused a visa, unless such refusal was overcome or a waiver of ineligibility has been obtained;

(C) is listed in the Consular Lookout and Support System (or successor system at the Department of State);

(D) is a national of a country officially designated by the Secretary of State as a state sponsor of terrorism, except such nationals who possess nationalities of countries that are not designated as state sponsors of terrorism;

(E) requires a security advisory opinion or other Department of State clearance, unless such alien is—

(i) within that class of nonimmigrants enumerated in subparagraph (A) or (G) of section 1101(a)(15) of this title;

(ii) within the NATO visa category;

(iii) within that class of nonimmigrants enumerated in section 1101(a)(15)(C)(iii) of this title (referred to as the "C-3 visa" category); or

(iv) an alien who qualifies for a diplomatic or official visa, or its equivalent; or

(F) is identified as a member of a group or sector that the Secretary of State determines—

(i) poses a substantial risk of submitting inaccurate information in order to obtain a visa;

(ii) has historically had visa applications denied at a rate that is higher than the average rate of such denials; or

(iii) poses a security threat to the United States.

7. **8 U.S.C. § 1361 provides:**

Burden of proof upon alien

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter. In any removal proceeding under part IV of this subchapter against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

8. **50 U.S.C. § 21 provides:**

Restraint, regulation, and removal

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

9. **Act of May 22, 1918, 40 Stat. 559, provides:**

An Act to prevent in time of war departure from or entry into the United States contrary to the public safety.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or

enter not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

SEC. 2. That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport.

SEC. 3. That any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly

participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

SEC. 4. That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic.

10. **Act of June 21, 1941, 55 Stat. 252, provides:**

To amend the Act of May 22, 1918 (40 Stat. 559).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 1 of the Act of May 22, 1918 (40 Stat. 559), is amended to read as follows:

"When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make

public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—".

SEC. 2. That section 3 of such Act of May 22, 1918, is amended to read as follows:

"Any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle, vessel or aircraft, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States."

SEC. 2a. That section 1 of such Act of May 22, 1918, is amended to read as follows:

"SEC 4. The term 'United States' as used in this Act includes the Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

"The word 'person' as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic."

SEC. 3. That such Act of May 22, 1918, is further amended by adding at the end thereof the following new sections:

"SEC. 5. Nothing in this Act shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under this Act or any law relating to the entry of aliens into the United States.

"SEC. 6. The revocation of any proclamation, rule, regulation, or order issued in pursuance of this Act, shall not prevent prosecution for any offense committed or the imposition of any penalties or forfeitures, liability for which was incurred under this Act prior to the revocation of such proclamation, rule, regulation, or order."

EXECUTIVE MATERIALS INVOLVED

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1. **22 C.F.R. § 41.11 provides:**

Entitlement to nonimmigrant status.

(a) *Presumption of immigrant status and burden of proof.* An applicant for a nonimmigrant visa, other than an alien applying for a visa under INA 101(a)(15) (H)(i) or (L), shall be presumed to be an immigrant until the consular officer is satisfied that the alien is entitled to a nonimmigrant status described in INA 101(a)(15) or otherwise established by law or treaty. The burden of proof is upon the applicant to establish entitlement for nonimmigrant status and the type of nonimmigrant visa for which application is made.

(b) *Aliens unable to establish nonimmigrant status.* (1) A nonimmigrant visa shall not be issued to an

alien who has failed to overcome the presumption of immigrant status established by INA 214(b).

(2) In a borderline case in which an alien appears to be otherwise entitled to receive a visa under INA 101(a)(15)(B) or (F) but the consular officer concludes that the maintenance of the alien's status or the departure of the alien from the United States as required is not fully assured, a visa may nevertheless be issued upon the posting of a bond with the Secretary of Homeland Security under terms and conditions prescribed by the consular officer.

2. **22 C.F.R. § 41.105 provides:**

Supporting documents and fingerprinting.

(a) *Supporting documents*—

(1) *Authority to require documents.* The consular officer is authorized to require documents considered necessary to establish the alien's eligibility to receive a nonimmigrant visa. All documents and other evidence presented by the alien, including briefs submitted by attorneys or other representatives, shall be considered by the consular officer.

(2) *Unobtainable documents.* If the consular officer is satisfied that a document or record required under the authority of this section is unobtainable, the consular officer may accept satisfactory alternative pertinent evidence. A document or other record shall be considered unobtainable if it cannot be procured without causing the applicant or a member of the

applicant's family actual hardship as distinct from normal delay and inconvenience.

(3) *Photographs required.* Every applicant for a nonimmigrant visa must furnish a photograph in such numbers as the consular officer may require. Photographs must be a reasonable likeness, 1 ½ by 1 ½ inches in size, unmounted, and showing a full, front-face view of the applicant against a light background. At the discretion of the consular officer, head coverings may be permitted provided they do not interfere with the full, front-face view of the applicant. The applicant must sign (full name) on the reverse side of the photographs. The consular officer may use a previously submitted photograph, if he is satisfied that it bears a reasonable likeness to the applicant.

(4) *Police certificates.* A police certificate is a certification by the police or other appropriate authorities stating what, if anything, their records show concerning the alien. An applicant for a nonimmigrant visa is required to present a police certificate if the consular officer has reason to believe that a police or criminal record exists, except that no police certificate is required in the case of an alien who is within a class of nonimmigrants classifiable under visa symbols A–1, A–2, C–3, G–1 through G–4, NATO–1 through NATO–4 or NATO–6.

(b) *Fingerprinting.* Every applicant for a nonimmigrant visa must furnish fingerprints, as required by the consular officer.

3. **22 C.F.R. § 42.65 provides:**

Supporting documents.

(a) *Authority to require documents.* The consular officer is authorized to require documents considered necessary to establish the alien's eligibility to receive an immigrant visa. All such documents submitted and other evidence presented by the alien, including briefs submitted by attorneys or other representatives, shall be considered by the officer.

(b) *Basic documents required.* An alien applying for an immigrant visa shall be required to furnish, if obtainable: a copy of a police certificate or certificates; a certified copy of any existing prison record, military record, and record of birth; and a certified copy of all other records or documents which the consular officer considers necessary.

(c) *Definitions.*

(1) Police certificate means a certification by the police or other appropriate authorities reporting information entered in their records relating to the alien. In the case of the country of an alien's nationality and the country of an alien's current residence (as of the time of visa application) the term "appropriate police authorities" means those of a country, area or locality in which the alien has resided for at least six months. In the case of all other countries, areas, or localities, the term "appropriate police authorities" means the authorities of any country, area, or locality in which the alien has resided for at least one year. A consular officer may require a police certificate regardless of length of residence in any country if he or she has reason to believe that a police record exists in the country, area, or locality concerned.

(2) Prison record means an official document containing a report of the applicant's record of confinement and conduct in a penal or correctional institution.

(3) Military record means an official document containing a complete record of the applicant's service and conduct while in military service, including any convictions of crime before military tribunals as distinguished from other criminal courts. A certificate of discharge from the military forces or an enrollment book belonging to the applicant shall not be acceptable in lieu of the official military record, unless it shows the alien's complete record while in military service. The applicant may, however, be required to present for inspection such a discharge certificate or enrollment book if deemed necessary by the consular officer to establish the applicant's eligibility to receive a visa.

(4) A certified copy of an alien's record of birth means a certificate issued by the official custodian of birth records in the country of birth showing the date and place of birth and the parentage of the alien, based upon the original registration of birth.

(5) Other records or documents include any records or documents establishing the applicant's relationship to a spouse or children, if any, and any records or documents pertinent to a determination of the applicant's identity, classification, or any other matter relating to the applicant's visa eligibility.

(d) *Unobtainable documents.*

(1) If the consular officer is satisfied, or the catalogue of available documents prepared by the

Department indicates, that any document or record required under this section is unobtainable, the officer may permit the immigrant to submit other satisfactory evidence in lieu of such document or record. A document or other record shall be considered unobtainable if it cannot be procured without causing to the applicant or a family member actual hardship as opposed to normal delay and inconvenience.

(2) If the consular officer determines that a supporting document, as described in paragraph (b) of this section, is in fact unobtainable, although the catalogue of available documents shows it is available, the officer shall affix to the visa application a signed statement describing in detail the reasons for considering the record or document unobtainable and for accepting the particular secondary evidence attached to the visa.

(e) *Authenticity of records and documents.* If the consular officer has reason to believe that a required record or document submitted by an applicant is not authentic or has been altered or tampered with in any material manner, the officer shall take such action as may be necessary to determine its authenticity or to ascertain the facts to which the record or document purports to relate.

(f) *Photographs.* Every alien shall furnish color photographs of the number and specifications prescribed by the Department, except that, in countries where facilities for producing color photographs are unavailable as determined by the consular officer, black and white photographs may be substituted.

4. **Proclamation 1473, August 8, 1918, provides in pertinent part:**

Issuance of Passports and Permits to enter or leave the United States.

Whereas by act of Congress approved the 22d day of May, 1918, entitled "An act to prevent in time of war departure from and entry into the United States contrary to the public safety," it is provided as follows:

* * * * *

And whereas other provisions relating to departure from and entry into the United States are contained in section 3, subsection (b), of the trading-with-the-enemy act, approved October 6, 1917, and in section 4067 of the Revised Statutes, as amended by the act of April 16, 1918, and sections 4068, 4069, and 4070 of the Revised Statutes, and in the regulations prescribed in the President's proclamations of April 6, 1917; November 16, 1917; December 11, 1917; and April 19, 1918;

And whereas the act of May 20, 1918, authorizes me to co-ordinate and consolidate executive agencies and bureaus in the interest of economy and more efficient concentration of the Government;

Now, therefore, I, Woodrow Wilson, President of the United States of America, acting under and by virtue of the aforesaid authority vested in me, do hereby find and publicly proclaim and declare that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by the act of May 22, 1918, above mentioned, shall be imposed upon the departure of persons from and their entry into the United States; and I make the following orders thereunder:

1. No citizen of the United States shall receive a passport entitling him to leave or enter the United States unless it shall affirmatively appear that there are adequate reasons for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

2. No alien shall receive permission to depart from or enter the United States unless it shall affirmatively appear that there is reasonable necessity for such departure or entry and that such departure or entry is not prejudicial to the interests of the United States.

3. The provisions of this proclamation and the rules and regulations promulgated in pursuance hereof shall not be held to suspend or supersede in any respect, except as herein expressly provided the President's proclamations of April 6, 1917; November 16, 1917; December 11, 1917, and April 19, 1918, above referred to; nor shall anything contained herein be construed to suspend or supersede any rules or regulations issued under the Chinese exclusion law or the immigration laws, except as herein expressly provided; but the provisions hereof shall, subject to the provisos above mentioned, be regarded as additional to such rules and regulations. Compliance with this proclamation and the rules and regulations promulgated in pursuance hereof shall not exempt any individual from the duty of complying with any statute, proclamation, order, rule, or regulations not referred to herein.

4. I hereby designate the Secretary of State as the official who shall grant, or in whose name shall be granted, permission to aliens to depart from or enter

the United States; I reaffirm sections 25, 26, and 27 of the Executive order of October 12, 1917, vesting in the Secretary of State the administration of the provisions of section 3, subsection (6), of the trading with enemy act; I transfer to the Secretary of State the Executive administration of regulations 9 and 10 of the President's proclamation of April 6, 1917; of regulation 15 of the President's proclamation of November 16, 1917, and of regulations 1 and 2 of the President's proclamation of December 1, 1917, and the executive administration of the aforesaid regulations as extended by the President's proclamation of April 19, 1918, said executive administration heretofore having been delegated to the Attorney General under dates of April 6, 1917; November 16, 1917; December 11, 1917, and April 19, 1918. The Rules and Regulations made by the Secretary of the Treasury, as authorized by Title II, section 1, of the espionage act approved June 15, 1917, and by the Executive order of December 3, 1917, shall be superseded by this proclamation and the rules and regulations promulgated in pursuance hereof in so far as they are inconsistent therewith.

I hereby direct all departments of the Government to co-operate with the Secretary of State in the execution of his duties under this proclamation and the rules and regulations promulgated in pursuance hereof. They shall upon his request make available to him for that purpose the services of their respective officials and agents. The Secretary of the Treasury, the Secretary of War, the Attorney General, the Secretary of the Navy, the Secretary of Commerce, and the Secretary of Labor shall, at the request of the Secretary of State, each appoint a representative to render to the Secretary of State, or

his representative, such assistance and advice as he may desire respecting the administration of this proclamation and of the rules and regulations aforesaid.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this eighth day of August, in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States, the one hundred and forty-third.

By the President: WOODROW WILSON.

5. **Proclamation 2523, November 14, 1941, provides:**

Control of Persons Entering and Leaving the United States

WHEREAS the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (Public Law 114, 77th Cong., chap. 210, 1st sess., 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941, or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS the national emergency proclaimed by me on May 27, 1941 is still existing; and

WHEREAS there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

WHEREAS the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

(1) After the effective date of the rules and regulations hereinafter authorized, no citizen of the United States or person who owes allegiance to the United States shall depart from or enter, or attempt

to depart from or enter, the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport issued by the Secretary of State or, under his authority, by a diplomatic or consular officer of the United States, or the United States High Commissioner to the Philippine Islands, or the chief executive of Hawaii, of Puerto Rico, of the Virgin Islands, of American Samoa, or of Guam, or unless he comes within the provisions of such exceptions or fulfils such conditions as may be prescribed in rules and regulations which the Secretary of State is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed. Seamen are included in the classes of persons to whom this paragraph applies.

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed; nor shall any alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit-issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the

Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would he prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(4) No person shall depart from or enter, or attempt to depart from or enter, the United States without submitting for inspection, if required to do so, all documents, articles, or other things which are being removed from or brought into the United States upon or in connection with such person's departure or entry, which are hereby made subject to official inspection under rules and regulations which the Secretary of State in the cases of citizens, and the Secretary of State with the concurrence of the

Attorney General in the cases of aliens, is hereby authorized to prescribe.

(5) A permit to enter issued to an alien seaman employed on a vessel arriving at a port in the United States from a foreign port shall be conditional and shall entitle him to enter only in a case of reasonable necessity in which the immigration authorities are satisfied that such entry would not be contrary to the interests of the United States; but this shall not be deemed to supersede the provisions of Executive Order 8429, dated June 5, 1940 concerning the documentation of seamen.

(6) The period of validity of a permit to enter or a permit to depart, issued to an alien, may be terminated by the permit-issuing authority or by the Secretary of State at any time prior to the entry or departure of the alien, provided the permit-issuing authority or the Secretary of State is satisfied that the entry or departure of the alien would be prejudicial to the interests of the United States which it was the purpose of the above-mentioned acts to safeguard.

(7) Except as provided herein or by rules and regulations prescribed hereunder, the provisions of this proclamation and the rules and regulations issued in pursuance hereof shall be in addition to, and shall not be held to repeal, modify, suspend, or supersede any proclamation, rule, regulation, or order heretofore issued and now in effect under the general statutes relating to the immigration of aliens into the United States; and compliance with the provisions of this proclamation or of any rule or regulation which may hereafter be issued in pursuance of the act of May 22, 1918, as amended by

the act of June 21, 1941, shall not be considered as exempting any individual from the duty of complying with the provisions of any statute, proclamation, rule, regulation, or order heretofore issued and now in effect.

(8) I direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order promulgated in pursuance hereof. They shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of the act of May 22, 1918, as amended by the act of June 21, 1941, and in bringing to trial and punishment any persons who shall have violated any provisions of such acts.

(9) Paragraph 6, part 1, of Executive Order 8766, issued June 3, 1941, is hereby superseded by the provisions of this proclamation and such regulations as may be prescribed hereunder.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this 14th day of November, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-sixth.

By the President: FRANKLIN D. ROOSEVELT

6. **22 C.F.R. § 58.47 (1941) provides:**

Classes of aliens whose entry is deemed to be prejudicial to the public interest.

The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purpose of these regulations:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918 (40 Stat. 1012) as amended;

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of a political organization associated with or carrying out the policies of any foreign government opposed to the measures adapted by the Government of the United States in the public interest or in the interest of national defense or in the interest of the common defense of the countries of the Western Hemisphere;

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of the United States;

(d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country;

(e) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the

interest of the common defense of the countries of such Hemisphere;

(f) Any alien engaged in organizing or directing any rebellion, insurrection, or violent uprising against the United States;

(g) Any alien engaged in a plot or plan to destroy materials or sources thereof vital to the defense of the United States;

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (Public Law 118, 77th Cong.);

(i) Any alien who is not within one or more of the foregoing classes, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 to safeguard.

7. **22 C.F.R. § 58.53 (1945) provides:**

Classes of aliens whose entry is deemed to be prejudicial to the public interest.

The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 58.41-58.63:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended. (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U.S.C. 137.)

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection

with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (ch. 209, 55 Stat. 252; 22 U.S.C., Sup., 228, 229).

(i) Any alien enemy: *Provided,* That this excluding provision shall not apply to aliens who

(1) Present valid permits to enter issued on or after November 14, 1941, or are exempted under these regulations from presenting permits to enter and are found to be otherwise admissible under these regulations; or

(2) Before September 1, 1939, became and still are citizens or subjects of any foreign country at war with Japan and who have not, since September 1, 1939, and before May 8, 1945, returned to any enemy or enemy-controlled territory; or

(3) Are under 14 years of age; or

(4) Are excepted from the excluding provisions of this section in the discretion of the permit-issuing authority or of the Secretary of State.

(j) Any alien found to be, or charged with being, a war criminal by the appropriate authorities of the United States or one of its co-belligerents, or an alien who has been guilty of, or who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's

admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252) to safeguard.